Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1931

No. 62

AMERICAN HIDE AND LEATHER COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 29, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,844)

(35,844)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 922

AMERICAN HIDE AND LEATHER COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 922

AMERICAN HIDE AND LEATHER COMPANY, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

The American Hide and Leather Company, a corporation, by its attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the cause between the above named parties on November 3rd, 1930, not yet reported. Motion for a new trial was, after argument, denied April 6th, 1931, by opinion not yet reported.

Statutes Involved

Revenue Act of 1918

"Title II.—Income Tax

Part I.—General Provisions

Definitions

Sec. 200. That when used in this title—

The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section [fol. 2] 212 or section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. * * *"

Section 212(b) of the Revenue Act of 1918 provides:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *"

Section 230(a) of the Revenue Act of 1918 provides:

"That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates: * * *."

Section 232 of the Revenue Act of 1918 provides:

"That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226."

Section 239 of the Revenue Act of 1918 provides:

"That every corporation subject to taxation under this title and every personal service corporation shall make a return stating specifically the items of its gross income [fol. 3] and the deductions and credits allowed by this title. * * *

Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (c) of section 236 shall be reduced to an amount which bears the same ratio to the full credit therein provided as the number of months in the period for which such return is made bears to twelve months."

Section 251 of the Revenue Act of 1918 provides:

"That every collector to whom any payment of any tax is made under the provisions of this title shall upon re-

quest give to the person making such payment a full written or printed receipt, stating the amount paid and the particular account for which such payment was made; * * *."

Statement

This suit was instituted in the Court of Claims of the United States to recover $556,754.72 as an overpayment of income and excess profits tax for the fiscal year beginning July 1, 1919 and ending June 30, 1920. The material facts may be abridged as follows:

The American Hide and Leather Company, a corporation, filed a return for the calendar year 1918, containing a statement of income, deductions and credits from January 1, 1918 to December 31, 1918, upon which a tax of $1,246,271.24 was paid. A similar return for the calendar year 1919 was filed, upon which a tax of $1,113,509.41 was paid. The return filed for the calendar year 1920 disclosed substantial losses.

When the Commissioner of Internal Revenue came to audit these calendar year returns, he finally determined [fol. 4] that as the petitioner kept its books of account on the basis of a fiscal year ending June 30 and on an accrual basis of accounting, he by letter dated November 18, 1925, ordered the petitioner to file returns for the fiscal years, July 1 to June 30 for 1919 and 1920 to 1925 inclusive.

In compliance therewith, the petitioner on January 22, 1926, filed a return for the fiscal year ended June 30, 1919, reporting a total tax liability of $858,205.88. A return was also filed for the fiscal year 1920, disclosing a net loss of $1,739,036.96.

On January 6, 1927 the petitioner received a letter from the Commissioner of Internal Revenue stating that since no return had been filed for the fiscal year 1918, that the Bureau held that the case came within Section 273 (a) of the Revenue Act of 1926, providing that where the taxpayer fails to file a return the amount of the tax may be assessed at any time, and a return for the fiscal year 1918 was requested.

On February 1, 1927 the petitioner filed a return for the period January 1, 1918 to June 30, 1918, disclosing a tax liability of $544,415.86.

A proper claim for refund was duly filed for the fiscal year July 1, 1919 to June 30, 1920. The Government was at all times protected by waivers for all years.

For the period January 1, 1918 to December 31, 1919 the petitioner paid on income accrued during these twenty-four months taxes in the amount of $2,339,780.65, being $1,246,-271.24 for the calendar year 1918 and $1,113,509.41 for the [fol. 5] calendar year 1919. Based on the determination of the Commissioner of Internal Revenue, the tax liability of the petitioner for the fiscal period January 1 to June 30, 1918, was in the amount of $708,068.47 and for the fiscal year July 1, 1918 to June 30, 1919, in the amount of $896,-314.83. The petitioner's tax liability for the eighteen months, as determined by the Commissioner, is $1,604,-383.30.

The Commissioner of Internal Revenue, upon receipt of the fiscal year returns, adjusted the calendar years 1918, 1919 and 1920 income returned and deductions taken to the correct fiscal year periods, but refused to adjust the tax payments thereon in like manner.

The Commissioner accepted the entire amount of $1,246,-271.44 as a payment for the specific period January 1 to December 31, 1918 but subsequently treated it as a payment for the period January 1 to June 30, 1918 even though the tax liability determined by the Commissioner for the latter period was only $708,068.47. The difference between the correct tax liability for the fiscal year 1918 and the amount paid for the calendar year 1918 thereby becomes under the Commissioner's treatment an overpayment for the period January 1 to June 30, 1918.

Likewise, the $1,113,504.41 accepted by the Commissioner as a payment for the calendar year 1919 was subsequently treated as a payment for the fiscal year July 1, 1918 to June 30, 1919. The latter period embraces the six months from July 1 to December 31, 1918, upon the income for which six months taxes were paid under the calendar year [fol. 6] 1918 return, which taxes he had already treated as an overpayment for the fiscal year 1918.

The Commissioner by treating the calendar year 1919 payment as having been made for the fiscal year 1919, has eliminated from the fiscal year 1920 all of the tax paid on the income for the six months from July 1 to December 31, 1919, which six months is part of the fiscal year 1920. The

Commissioner adjusted the income for this six months to the fiscal year 1920. There being no tax liability for the fiscal year 1920 it is apparent that if the tax paid upon the income accrued for the said six months is adjusted to the fiscal year 1920 it will result in a refund to the petitioner of not less than $443,367.61 for the fiscal year 1920.

This action by the Commissioner of Internal Revenue is based on his holding that each calendar year return containing a statement of income, credits and deductions for a period from January 1 to December 31 is a statutory return for a different period, namely for the respective fiscal year ending June 30, and that the tax assessed and paid on each calendar year accruals must be treated as having been assessed and paid for fiscal year accruals.

Specification of Errors

(a) The Court of Claims erred in holding that the sum of $443,367.61 was an overpayment for the fiscal year 1918 and was barred by the Statute of Limitations.

(b) The Court of Claims erred in failing to hold that the sum of $443,367.61 was an overpayment for the fiscal year 1920 and was not barred by the Statute of Limitations.

[fol. 7] (c) The Court of Claims erred in basing the decision in this case on the case of P. L. Mann, 44 Fed. 2d 1005.

Question Presented

When a taxpayer makes a voluntary payment of a tax, which is intended to and does represent, and which the Government so accepts and stipulates in writing did represent, a tax upon income for a specified twelve months' period, can such payment be subsequently treated as having been made for another and different period embracing other and different income?

This question is not only important to the taxpayer but equally so to the Government in the administration of tax law.

Reasons for Granting the Writ

The decision of the Court of Claims is in conflict with the following:

(a) The decision of this Court in Lynch v. Turrish, 247 U. S. 241, in that it disregards the principle that "the purpose of an income tax law was to tax the income for the year that it accrued; in other words, no tax in contemplation of the law accrues upon something except for the year in which that something, * * * earnings, profits, gains or income * * * accrues." (See also Burnet v. Sanford & Brooks, 51 S. Ct. 150.)

(b) The decision of this Court in Fawcus Machine Company v. U. S., 51 S. Ct. 144, wherein it was held that "a corporation cannot claim to have accumulated any net income in any year until provision is made for taxes accrued, based on net income for the same year." (See also Aluminum Castings Company v. Routzahn, 282 U. S. 92; and U. S. v. Anderson, 269 U. S. 442.)

[fol. 8] (c) The decision by the United States Board of Tax Appeals in Paso Robles Mercantile Company v. the Commissioner, 18 B. T. A. 415, wherein it is held that a tax erroneously determined on a calendar year basis must be credited on the tax shown due on a fiscal year basis in proportion to the months in the respective calendar years making up the fiscal year. (Petition to review dismissed by the Circuit Court of Appeals for the Ninth Circuit, November 19, 1930. Published in 1930 Commerce Clearing House Service, Vol. 3, Decision Number 9697.) The Government having decided that no appeal should be taken. (See also Paso Robles Mercantile Company v. the Commissioner, 12 B. T. A. 750; Lowenstein Brothers Garment Co. v. the Commissioner, 13 B. T. A. 446.)

(d) The decision in Commissioner v. Leasing and Building Co., 46 Fed. (2nd) 2, in which it was held that tax due under a specific return for a calendar year cannot be regarded as having been due for a fiscal year.

(e) The decision of this Court in Florsheim Brothers Drygoods Co., Ltd. v. United States, 230 U. S. 453, wherein the Court stated at page 111: "It may be true that the filing of a return which is defective or incomplete under section 239 is sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period. But the defective or incomplete

return purports to be a specific statement of the items of income, deductions and credits in compliance with section 239. And, to have that effect, it must honestly and reasonably be intended as such."

(f) With the decisions in United States v. National Tank and Export Company, 45 Fed. (2nd) 1005, (certiorari denied April 20, 1931,) and Paso Robles Mercantile Company v. Commissioner, 33 Fed. (2nd) 53, in that in each of these [fol. 9] cases the final judgments were based upon the principle that a return which does not cover the time or income embraced in the taxpayer's correct taxable year, nor include the information upon which an assessment may be based for the correct taxable year, is not a statutory return. This principle was enunciated in Willingham Loan and Trust Company, 15 B. T. A. 931, and affirmed by the Circuit Court of Appeals, 36 Fed. (2nd) 49, and was not disputed in Burnet v. Willingham Loan and Trust Company, 51 S. Ct. 185. (See also Cantrell and Cochrane, Ltd. v. Commissioner, 19 B. T. A. 16.)

(g) Section 251 of the Revenue Act of 1918 in that the decision of the Court of Claims sanctions a treatment of tax payments which is contrary to the direction and intention of the taxpayer.

Income and Tax Payment Thereon Inseparable—Payment is Not an Overpayment

The defendant admits by stipulation, and the Court of Claims finds as a fact that the petitioner overpaid its taxes in an amount not less than $443,367.61. The petitioner contends that the taxes were overpaid for the fiscal year 1920, for which period a claim for refund was properly filed. The defendant claims that the taxes were overpaid for the fiscal year 1918, for which period a proper claim for refund was not filed within the time prescribed by law.

Petitioner contends that the payment was made for the fiscal year 1920, by reason of the fact that the income upon which the taxes accrued is contained in the fiscal year 1920. It is respectfully submitted that taxes and the income from which they arise are inseparable. Therefore, when the income giving rise to the tax in the instant case was found to be income for the fiscal year 1920, the payment should

[fol. 10], have been treated as a payment for the fiscal year 1920.

Petitioner's contention is further borne out by the fact that the Commissioner of Internal Revenue, upon determining that petitioner's books were kept on a fiscal year basis, adjusted the income, credits and deductions to the respective fiscal years, but did not so adjust the payments. His failure to adjust the payments in the same manner as he adjusted the income violated the principle that tax follows income, and disregarded the expressed intention of the parties when the payments were made, namely, that they were made for the twelve months period from January 1 to December 31.

In order to hold that the Statute of Limitations bars the recovery of the amount agreed to be overpaid, the Commissioner of Internal Revenue adopted the theory that tax payments made for and intended to apply to the period from January 1 to December 31, 1918, became payments for the fiscal period January 1 to June 30, 1918, and that any amount paid for the twelve months calendar year period which exceeded the tax liability determined for the six months fiscal period was an overpayment for such fiscal period.

The Court of Claims in upholding the Commissioner's theory predicates its conclusion that petitioner's overassessment was for the fiscal year 1918 upon the proposition that petitioner's calendar year returns must be regarded as statutory returns for the fiscal years. This Court, in Florsheim Brothers Drygoods Co., Ltd. v. United States, supra, held that a return which does not satisfy the requirements of Section 239 of the Revenue Act of 1918 is not a statutory return. (See also Pilliod Lumber Company v. United States, 51 S. Ct. 297.) In the instant case, petitioner's returns did not comply with Section 239 in that no [fol. 11] calendar year return filed by the petitioner purported to or did cover the twelve months of the taxable (fiscal) year, nor disclosed the income of more than six months of the taxable (fiscal) year. None of the petitioner's calendar year returns filed met the requirements of Section 239, and each was, therefore, a defective return, which, standing alone, is insufficient to constitute a statutory return for the taxable (fiscal) year.

In the case of P. L. Mann v. United States, supra, cited by the Court in petitioner's case, the Court quotes Section 200 of the Revenue Act of 1918 as its authority for holding that a calendar year return must be regarded as a statutory return, stating: "* * * the return, although erroneous, must be treated as a return under the statute, and it can only be treated as a return for a taxable period or year that has ended during the period covered by it."

It is respectfully submitted that petitioner's individual calendar year returns, not being in compliance with Section 239 of the Revenue Act, not only need not but can not be treated as statutory returns for the taxable (fiscal) year. The Court's reliance upon Section 200 of the Revenue Act as its reason for concluding that the calendar year return must be regarded as a return for the fiscal year is founded upon a misinterpretation of that section. Section 200 defines the term "taxable year". It has no relation whatsoever to the nature, scope or requirements of returns which are fully covered in Section 239, and was inserted in the Act merely to explain the distinction between the two types of taxable years contemplated by the income tax law. Further, Section 200, by its own provisions, directs attention to Section 212 of the Revenue Act of 1918 and states that the taxable year shall be either a calendar year or a fiscal [fol. 12] year, depending upon the basis upon which the taxpayer's net income is computed.

Thus, it is pointed out that the proposition that the petitioner's calendar year returns must be regarded as statutory returns for the fiscal years is in error and the conclusion reached by the Court of Claims, based upon this reasoning, is incorrect.

It is further respectfully submitted that even if the theory as to returns were sound, it would still be irrelevant to the question presented in the instant case. The payment of taxes is not made upon a return, but upon the income for the period for which the return is filed. Any theory that treats a calendar year return filed for a period from January 1 to December 31 as a return for another period, cannot destroy the fact that the income reflected by the return actually accrued during the period from January 1 to December 31. It is a fact that the payment in the in-

stant case was made on income from January 1 to December 31, and it is respectfully urged that when a fact and a theory conflict, the fact must prevail.

The decision of the Court of Claims, therefore, is not only founded upon an erroneous premise, arrived at by misinterpretation of Section 200 of the Revenue Act of 1918, unsupported by any accepted rule of law or decision, but, further and fundamentally, it is in error because it supplants a fact with a theory and violates the fundamental principle of income tax law, that tax is dependent upon and arises from income, as enunciated by this Court in Lynch v. Turrish, supra.

The instant case differs inter alia from the P. L. Mann [fol. 13] case, supra, recently decided in the Court of Claims and relied on by that Court in its decision of this case, in that the instant case has for its sole issue the treatment of tax payments on actually accrued income according to the intention of the taxpayer and so accepted by the Government.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

George E. Hamilton, William E. Hayes, Attorneys for Petitioner.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

No. J-555

AMERICAN HIDE AND LEATHER COMPANY, a Corporation, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendants

I. PETITION—Filed July 16, 1928

To the Honorable the Court of Claims:

The claimant in the above-entitled cause respectfully represents:

I

That the claimant is a corporation organized and existing under the Laws of the State of New Jersey; that it is

engaged in the manufacture and sale of leather, having its principal place of business at 17 East Street, Boston, Massachusetts. During the years in controversy the claim-
[fol. 2] ant's principal place of business was located at 92 Cliff Street, New York City, State of New York.

II

That this action is for the recovery of income and profits taxes erroneously and illegally assessed against and collected from the claimant by the defendant, and arises under the Revenue Act of 1918 (40 Stat. 1057).

III

That no action has been taken upon this claim before Congress, any Department of the Government or any court other than as herein set forth; that no person other than the claimant is the owner thereof or interested therein; that no assignment or transfer of this claim, or any part thereof or interest therein has been made; that the claimant, its officers and stockholders have at all times borne true allegiance to the Government of the United States and have not, in any way, voluntarily aided, abetted or given encouragement to rebellion against said Government; that the claimant is a citizen of the United States.

IV

The claimant duly filed with the Collector of Internal Revenue for the Second District of New York, New York City, New York, income and profits tax returns on the basis of calendar year returns from 1918 to 1921, inclusive, on the following dates, showing taxes due as follows:

Calendar year	1918,	$1,151,436.08,	filed July 14, 1919.
" "	1919,	1,187,444.67,	" May 15, 1920.
" "	1920,	None,	" May 21, 1921.
" "	1921,	None,	"

[fol. 3] In accordance with Section 250 of the Revenue Act of 1918, claimant paid said tax assessments to the Collector of Internal Revenue as aforesaid on the following dates and in amounts set forth:

March 14, 1919	$275,000.00
June 14, 1919	275,000.00
July 31, 1919	25,718.04

September 13, 1919	287,859.02
December 13, 1919	287,859.02
February 29, 1924	94,835.16
Total 1918 calendar year tax	$1,246,271.24
March 13, 1920	$300,000.00
June 14, 1920	293,722.34
September 14, 1920	296,861.16
December 15, 1920	222,925.91
Total 1919 calendar year tax	$1,113,509.41

The claimant's books of accounts and corporate records since the date of incorporation had been kept on the basis of a fiscal year ending June 30th.

The claimant received a letter from the Commissioner of Internal Revenue dated November 18, 1925, ordering amended fiscal year returns to be filed, in accordance with Section 212 (b) of the Revenue Act of 1918, copy of which letter is attached hereto and made a part hereof and marked Exhibit A.

The claimant in fulfillment of the order of the Commissioner, prepared and filed fiscal period returns amending the original calendar year returns and showing assessable taxes as follows:

Fiscal year return ended June 30, 1919—$858,205.88, filed January 22, 1926.

Fiscal year return ended June 30, 1920—None, filed January 22, 1926.

Proper waivers were duly filed by the claimant for the tax years 1919, 1920 and 1921.

The claimant received a letter from the Commissioner of Internal Revenue, dated January 6, 1927, requesting an [fol. 4] amended fiscal period return for the taxable period ended June 30, 1918, copy of which letter is attached hereto and made a part hereof and marked Exhibit B.

The claimant prepared and filed (on or about January 31, 1927) amended fiscal period return from January 1, 1918, to June 30, 1918, showing assessable taxes of $544,415.86.

Proper refund claims were prepared and filed covering the overpayments of taxes in excess of those properly due

under the fiscal period returns required by the Commissioner as follows:

Refund claim for 1918—$78,719.76—filed January 31, 1927.
" " " 1919—321,684.45— " January 16, 1926.
" " " 1920—556,754.72— " January 22, 1926.

V

The Commissioner of Internal Revenue has determined the tax assessable on the basis of fiscal year returns as follows:

Fiscal period January 1, 1918, to June 30, 1918	$708,068.47
Fiscal year ending June 30, 1919	896,314.83
Fiscal year ending June 30, 1920	None.

The Commissioner of Internal Revenue in letter dated August 10, 1927, notified the claimant that its claim for refund of $556,754.72 for the fiscal year ending June 30, 1920, was rejected for the reason *that* "that the total tax assessed for the calendar year 1919 has been applied against the tax liability for the fiscal year ended June 30, 1919," copy of which letter is attached hereto and made a part hereof and marked Exhibit C.

The Commissioner of Internal Revenue in the final audit of the returns for the fiscal periods ending June 30, 1918, June 30, 1919, and June 30, 1920, credited against the tax assessable for each respective period the tax which had been previously assessed for the calendar year as follows:

[fol. 5] Fiscal period January 1, 1918, to June 30, 1918—

Total tax assessable	$708,068.47
Tax previously assessed (cal. year 1918)	1,246,271.24
Overassessment	538,202.77

Fiscal year ending June 30, 1919—

Total tax assessable	$896,314.83
Tax previously assessed (cal. year 1919)	1,187,444.67
Overassessment	291,129.84

Fiscal year ending June 30, 1920—

Total tax assessable	None.
Tax previously assessed (cal. year 1920)	None.

VI

The Commissioner of Internal Revenue in applying the calendar year taxes against the tax liability as determined upon the fiscal year basis has credited the entire tax paid for the 12 months for the calendar year 1918 against the six months fiscal period from January 1, 1918, to June 30, 1918. The taxes paid for the calendar year 1919 have been credited in their entirety against the fiscal year ended June 30, 1919, which included six months income of the calendar year of 1918 and six months income of the calendar year 1919. Taxes had been previously paid upon this income partially in 1918 and 1919 calendar year returns. The Commissioner of Internal Revenue made the same adjustment in the same manner for the fiscal year ended June 30, 1920.

VII

That the claimant protested to the Commissioner of Internal Revenue against his allocation and application of credit for taxes previously assessed and paid on a calendar year basis for the years 1918, 1919, 1920 and 1921, as against the taxes properly assessable on fiscal year returns for the taxable periods January 1, 1918, to June 30, 1918, July 1, 1918, to June 30, 1919, July 1, 1919, to June 30, 1920.

By reason of the allocation and adjustment adopted by the Commissioner of Internal Revenue $443,367.61 already [fol. 6] computed and established as an overpayment, due the claimant has been refused as being barred by the Statute of Limitations.

VIII

Claimant is advised by its counsel, believes, and therefore avers that under the terms of the Revenue Act of 1918 and subsequent acts, more particularly Sec. 284 (a) of the Revenue Act of 1926, it is entitled to receive the amount of $556,754.72 with interest, applying the method of allocation and adjustment of credit for taxes paid to the fiscal years 1918 to 1920, inclusive, as intended by Congress, and the refusal of the Commissioner of Internal Revenue to refund this amount is unlawful and not in accordance with the provisions of the existing Internal Revenue laws.

IX

Claimant avers that the true method of allocation and adjustment should be determined by applying against the total tax assessable for each fiscal year 6/12 of the tax for the preceding calendar year and 6/12 of the tax assessed for the calendar year within which the fiscal year ends. This method is illustrated by the claimant's computation submitted herewith and made a part hereof and marked Exhibit D. By this method 6/12ths of the tax shown on the basis of the calendar year 1919, for instance, should be credited to the fiscal year 1919, since 6/12ths of the calendar year 1919 is in the fiscal year 1919. The other 6/12ths should be credited to the fiscal year 1920 since 6/12ths of the calendar year 1919 is in the fiscal year 1920.

[fol. 7]

X

Claimant avers that there is justly due and owing to it from the United States on account of matters hereinbefore set forth, the sum of $556,754.72; that it is the sole owner of the claim herein sued upon and that no assignment or transfer of the claim, or any part thereof or any interest therein, has been made.

Wherefore claimant prays judgment against the United States for $556,754.72 with interest thereon.

American Hide and Leather Company, by Carl F. Danner, President.

Duly sworn to by Carl F. Danner. Jurat omitted in printing.

[fol. 8]

EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR.Af. JWK.

Nov. 18, 1925.

American Hide and Leather Company, 11-17 East Street, Boston, Massachusetts.

SIRS: Reference is made to your letter dated October 21, 1925, enclosing affidavit relative to your accounting period

for the taxable year 1918 and subsequent years.

Relative to your request for an official ruling as to the proper basis upon which your returns for 1918 and subsequent years should have been filed, you are respectfully referred to Article 25 of Regulations 45 which reads in part as follows:

"A taxpayer having an existing accounting period which is a fiscal year within the meaning of the statute not only needs no permission to make his return on the basis of such a taxable year, but is required to do so, regardless of the former basis of rendering returns. * * * The first return under the present statute of a taxpayer who has heretofore made return on a basis different*ce* from his accounting period will necessarily overlap his next previous return."

[fol. 9] For the method of adjusting the tax in such a case, see Section 205 of the Revenue Act of 1918 as defined by Articles 1621 to 1625 of Regulations 45.

It is evident from the information contained in your affidavit that your returns for 1918 and subsequent years should have been filed on the basis of fiscal years ended June 30. Since no waivers were filed for the calendar year 1918, the Statute of Limitations precludes the further adjustment of your tax liability for that year. Inasmuch as a waiver has been filed for 1919, the amended return for that year should cover the full fiscal year from July 1, 1918, to June 30, 1919, and the tax computed in accordance with Article 1625 of Regulations 45 except that the 1918 portion of the tax should be eliminated.

Since the change in your accounting period to a calendar year basis was made without the approval of the Commissioner of Internal Revenue, as required in Article 26 of Regulations 45, 62 and 65, amended returns should also be filed for the years 1920 to 1925, inclusive, on the basis of fiscal years ended June 30 of each year.

In view of the delay occasioned by the filing of amended returns in the audit of your returns for 1920 to 1921, waivers should be filed extending the period of limitation on those years to December 31, 1926, for which forms are enclosed.

In the event of further correspondence relative to this matter, reference should be made to IT:CR: Af—JWK.

Respectfully, (Signed) C. R. Nash, Assistant to the Commissioner.

Enclosures: 4 Waiver Forms.

[fol. 10] EXHIBIT "B" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:D. PHR.

Jan. 6, 1927.

American Hide and Leather Company, 11-17 East Street, Boston, Massachusetts.

SIRS: Reference is made to Bureau letter dated November 18, 1925, in reply to your letter and affidavit dated October 21, 1925, relative to your accounting period and returns required for 1918 and subsequent years.

In this connection, you are advised that Article 25 of Regulations 45 provides that, "except in the cases of a return for the taxable year 1918 and of a first return for income tax the taxpayer shall make his return on the basis (fiscal or calendar) upon which he made his return for the taxable year immediately preceding, unless * * * he has changed the basis of computing his income." Accordingly, the 1918 and 1919 returns, in your case, must be filed on the same basis.

Article 25 of Regulations 45 further provides that, "the taxpayer having an existing accounting period, which is a fiscal year within the meaning of the statute not only needs no permission to make his return on the basis of such a taxable year, but is required to do so, regardless of the former basis of rendering returns.". This provision applies to 1918 as well as 1919.

[fol. 11] Therefore, notwithstanding the waiver status for the year 1918, as referred to in the above-mentioned Bureau letter, since no return has been filed for the year ended June 30, 1918, the recognized accounting period of your

company, the Bureau holds that your case comes within the provision of Section 278(a) of the Revenue Act of 1926. As set forth in Article 1271, Paragraph 5, of Regulations 69, "in the event that the taxpayer fails to file the return, the amount of tax due may be assessed at any time after the date prescribed for filing the return."

Since the 1918 case is still open and not subject to the inhibition of the bar as provided by Section 277 of the Revenue Act of 1926, it is requested that an amended return for the fiscal year beginning July 1, 1917, and ending June 30, 1918, be filed at your earliest convenience, in order that the revised audit necessitated by the change of basis on which your income is reported, may be completed as soon as practicable.

Further correspondence should be referred to IT:CR:D—PHR.

Respectfully, C. R. Nash, Assistant to the Commissioner, by (Signed) H. B. Robinson, Head of Division.

[fol. 12] EXHIBIT "C" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:D. PHR.

Aug. 10, 1927.

American Hide and Leather Company, 17 East Street, Boston, Mass.

SIRS: Your claims for the refund of $556,754.72 and $519,787.07, income and profits taxes for the fiscal year ended June 30, 1920, have been examined and are hereby rejected for the reason that the total tax assessed for the calendar year 1919 has been applied against the tax liability for the fiscal year ended June 30, 1919.

The basis of the above results are shown in schedule attached to a certificate of over-assessment for the fiscal year 1919.

An audit of your return for the fiscal year ended June 30, 1920, therefore, indicates no change in your tax liability for that year.

The claims will, therefore, be rejected.

This rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully, C. R. Nash, Assistant to the Commissioner, by (Signed) H. B. Robinson, Head of Division.

[fol. 13] EXHIBIT "D" TO PETITION

American Hide and Leather Company, 17 East Street, Boston, Massachusetts

Computation of Credit for Taxes Paid

Fiscal Period January 1, 1918, to June 30, 1918—	
Total tax assessable (amended return)	$544,415.86
Credit for taxes previously paid: (6/12 cal. year 1918)	623,135.62
Overassessment	$78,719.76
Fiscal year ended June 30, 1919—	
Total tax assessable (amended return)	$858,205.88
Credit for tax previously paid:	
(6/12 calendar year 1918, $623,135.62)	
(6/12 calendar year 1919, 556,754.71)	1,179,890.33
Overassessment	$321,684.45
Fiscal year ended June 30, 1920—	
Total tax assessable (amended return)	None.
Credit for taxes previously paid:	
(6/12 calendar year 1919, $556,754.72)	
(6/12 calendar year 1920, None.)	$556,754.72
Overassessment	$556,754.72

[fol. 14] II. GENERAL TRAVERSE—Filed August 25, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff

herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

D. E. R.

III. Argument and Submission of Case

On March 4, 1930, this case was argued and sumitted on merits by Mr. William E. Hayes, for plaintiff, and by Mr. Henry A. Cox, for defendant.

[fol. 15] **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Littleton, J.**—Filed November 3, 1930

Mr. William E. Hayes, for plaintiff.

Hayes & Hayes were on the brief.

Mr. H. A. Cox, with whom was Mr. Assistant Attorney General Charles B. Rugg, and Mr. C. J. Mattson for defendant.

Mr. Charles F. Kincheloe was on the brief.

This suit is for the recovery of $556,754.72, alleged to represent an overpayment of income and profits tax for the fiscal year ended June 30, 1920, with interest.

Plaintiff filed calendar-year returns for 1918, 1919, and 1920 when it should have filed returns for a fiscal year ending June 30, and in auditing these returns and adjusting plaintiff's tax liability the Commissioner of Internal Revenue treated the tax paid and assessed on the calendar-year returns as a tax paid for the fiscal year ending within the calendar year and applied such tax in satisfaction of the tax finally determined to be due for such fiscal year. In so doing the commissioner determined certain overassessments and overpayments. It developed that a refund of $443,367.61 paid on the calendar year 1918 return was barred by the statute of limitation.

Plaintiff claims that when the commissioner came to audit its returns, which were filed on an erroneous basis, he should have treated the tax paid on each of the calendar-year returns as a payment on account of the tax for the periods falling within the fiscal year ending June 30 in pro-

portion to the number of months falling within such fiscal year. Upon the basis of this contention the plaintiff claims that when it filed an erroneous calendar year 1919 return, six-twelfths or $556,754.72, of the tax paid thereon was a tax paid for the first six months of the fiscal year ending June 30, 1920, and that when it was found that plaintiff had a loss for the fiscal year ended June 30, 1920, this amount represented an overpayment for that year, which should have been refunded.

Special Findings of Fact

1. Plaintiff, a New Jersey corporation with principal place of business at New York, filed with the collector for the second district of New York on July 15, 1919, an income and profits tax return for the calendar year 1918 showing a taxable net income of $3,265,682.29 and a total tax of $1,151,436.08, which was assessed and was paid in four in- [fol. 16] stallments of $275,000 on March 20, 1919, and June 20, 1919, $25,718.04 on July 15, 1919, and $287,859.02 on September 16 and December 15, 1919.

2. May 15, 1920, it filed with the collector an income and profits tax return for the calendar year 1919 showing a net income of $5,193,011.16 and a total tax of $1,187,444.67, which was duly assessed.

December 15, 1920, plaintiff filed with the collector an amended income and profits tax return for the calendar year 1919 showing a net taxable income of $5,032,282.33 and a total tax of $1,113,509.41.

On the same date it filed with the collector a claim for abatement of $73,935.26, being the difference between the total tax shown on the original return and that shown on the amended return. The grounds upon which the abatement was claimed was a reduction in the inventory of December 31, 1919, due to an alleged loss by thefts and a decrease in market value. $1,113,509.41 of the total tax for the calendar year 1919 was paid in four installments of $300,000 on March 18, 1920, $293,722.34 on June 26, 1920, $296,861.16 on September 15, 1920, and $222,925.91 on December 24, 1920.

3. May 12, 1921, plaintiff filed an income and profits tax return for the calendar year 1920 showing a net loss of $7,982,322.34 and no tax due for said year.

4. April 30, 1920, a deputy commissioner of internal revenue notified plaintiff by letter that an examination of its income and profits tax returns for the calendar years 1917 and 1918 supported b- a field audit re-ulted in an additional tax due of $331,886.56 for 1917 and $301,183.38 for 1918. The additional tax for 1918 was assessed on the August, 1920, list and represented the difference between the amount of $1,452,619.46 determined as the correct tax for the calendar year 1918 and the amount previously assessed, as hereinbefore set forth. November 3, 1926, plaintiff filed a claim for the abatement of the entire additional assessment of $301,183.38 for 1918. October 30, 1922, the deputy commissioner of internal revenue notified plaintiff by letter that a consideration of the facts submitted by it in support of its claim for abatement of the additional tax determined and assessed for 1918 resulted in a further additional tax of $178,840.51 for 1917 and $425,643.35 for 1918. This additional tax of $425,643.35 for 1918 was not assessed.

5. September 15, 1923, plaintiff filed with the collector a claim for refund of $100,000, or such greater amount as might be legally refundable of income and profits tax paid for the period from January 1, 1918, to December 31, 1918. October 5, 1923, the plaintiff filed a claim for refund of $1,113,509.41 for the calendar year 1919.

6. January 12, 1924, the Deputy Commissioner of Internal Revenue notified the plaintiff that a reexamination of its returns for the calendar years 1909 to 1918, inclusive, had been made and that an overassessment of $206,348.22 had been determined for the calender year 1918, computed as follows:

Total tax		$1,246,271.24
Previously assessed:		
Original return	$1,151,436.08	
Additional June, 1920	301,183.38	
		1,452,619.46
Overassessment		206,348.22

[fol. 17] 7. February 18, 1924, the Commissioner of Internal Revenue issued a certificate of overassessment of $206,348.22 for 1918. With the issuance of this certificate

the claim for abatement of $301,183.38, referred to in finding 4, was allowed for the amount of the overassessment and rejected for the balance of $94,835.16. Plaintiff paid the last-mentioned amount to the collector under protest on March 1, 1924.

8. September 25, 1924, the plaintiff and the commissioner consented in writing to a determination, assessment, and collection of the tax due under any return made for the year 1919 until September 25, 1925. July 28, 1925, plaintiff and the commissioner signed a written consent in which plaintiff waived the time for making any assessment of the tax due under any return made for the year 1919 until December 31, 1926. This consent also provided for a further extension of the period in the event of an appeal to the United States Board of Tax Appeals. December 15, 1926, plaintiff and the commissioner signed a consent whereby plaintiff waived the time for making assessment of the tax due under any return made for the years 1919 and 1920 until December 31, 1927.

9. June 24, 1926, plaintiff executed and filed with the collector of internal revenue a waiver consenting to collection by distraint or proceedings in court of the tax assessed against it for the year 1919 until December 31, 1926. Plaintiff also executed and filed with the collector an undated waiver consenting to collection by distraint or proceedings in court of the tax in the amount of $73,955.26 for 1919 assessed in March, 1920.

10. On June 5, 1928, plaintiff filed with the collector at New York a consent dated June 1, 1928, whereby it agreed to the assessment of any tax due under any return made for the year and period 1918 until December 31, 1918. This consent also provided for a further extension by the mailing of a notice of deficiency and an appeal to the United States Board of Tax Appeals. This consent was signed by the plaintiff and the commissioner.

11. September 10, 1924, plaintiff filed with the collector a claim for refund of $226,064.74 of the tax paid for the calendar year 1919.

12. September 15, 1925, plaintiff filed claim for refund of $519,787.07, or such greater amount as might be legally

refundable, of the tax claimed to have been paid for the period June 30, 1919, to June 30, 1920.

13. January 22, 1926, plaintiff filed an amended income and profits tax return for the fiscal year ended June 30, 1919, reporting thereon a net income of $3,452,009.96 and showing a total tax of $858,205.88. Upon this return plaintiff computed a refund due of $321,684.45 by allocating one-half of the tax assessed on the 1918 calendar year return and one-half of the tax assessed on the calendar year 1919 return, and one-half of the amount of the outstanding claim for abatement to the fiscal year beginning July 1, 1918, and ending June 30, 1919, as follows:

Total tax		$858,205.88
Assessed 1918, $1,246,271.24 for six months	$623,135.62	
Assessed for 1919, $1,187,444.67 for six months	593,722.34	
		1,216,857.96
Overassessment		358,652.08
Claim for abatement outstanding	73,935.26	
Six months		36,967.63
Refund due		321,684.45

[fol. 18] 14. On the same date, January 22, 1926, plaintiff filed an amended return for the fiscal year ended June 30, 1920, reporting thereon a net loss of $1,739,036.96. Upon this return plaintiff computed a refund due of $556,754.72 by allocating one-half of the tax reported and assessed for the fiscal year 1919 to the fiscal year beginning July 1, 1919, and ending June 30, 1920, as follows:

Total tax due	None.	
Previously assessed:		
½ tax assessed 1919 of $1,187,444.69		$593,722.35
½ tax assessed 1920	None.	
Overassessment		593,722.35
½ claim for abatement outstanding, $73,935.26		36,967.63
Refund due		556,754.72

15. January 22, 1926, plaintiff filed claims for refund of $321,684.45 for the fiscal year ended June 30, 1919, and $556,754.72 for the fiscal year ended June 30, 1920, based upon the aforementioned amended returns for these fiscal years.

16. February 1, 1927, plaintiff filed a claim for refund of $78,719.76, or such greater amount as might be legally refundable, for the fiscal period January 1, 1918, to June 30, 1918. Attached to this claim were various schedules designated by plaintiff as an "Amended Return, Fiscal Period January 1, 1918, to June 30, 1918." Upon this claim and the schedules thereto attached plaintiff computed a refund due of $78,719.76 by allocating six-twelfths of the original tax returned, assessed, and paid, and the additional assessment, to the fiscal year ended June 30, 1918, as follows:

Total tax due		$544,415.86
Previously assessed:		
Original return $1,151,438.08 × 6/12	$575,719.04	
Add'l tax assessed $94,833.16 × 6/12	47,416.58	
		623,135.62
Refund due		78,719.76

17. The Commissioner of Internal Revenue having determined that plaintiff's books were kept on the fiscal year basis and that its returns should have been filed on the basis of a fiscal year ending June 30, applied the total tax assessed for the calendar year 1919 in satisfaction of the tax of plaintiff for the fiscal year ended June 30, 1919, and determined that no overpayment had been made for the fiscal year ended June 30, 1920. He, therefore, on August 10, 1927, rejected plaintiff's claims for refund of $556,754.72 and $519,787.07 for the fiscal year July 1, 1919, to June 30, 1920.

18. June 19, 1928, plaintiff filed a claim for refund of $538,202.77, alleged to have been overpaid for the period January 1, 1918, to June 30, 1918.

19. In his final decision in respect of plaintiff's tax liability for the taxable periods January 1, 1918, to June 30,

1918, and July 1, 1918, to June 30, 1919, the commissioner applied the total tax assessed on the calendar year 1918 return in satisfaction of the correct tax liability determined by him for the period beginning January 1, 1918, and ending June 30, 1918, and the total tax assessed on the calendar year 1919 return in satisfaction of the correct tax for the fiscal year beginning July 1, 1918, and ending June 30, [fol. 19] 1919. The Commissioner of Internal Revenue issued a certificate of overassessment setting forth the details of the computation of his final decision, as follows:

Previously assessed:	
Original return (406540)	$1,151,436.08
Additional, August, 1920, p. 95, L. 1	301,183.38
Total assessed	1,452,619.46
Reduced, February, 1924	206,348.22
Net assessment	1,246,271.24
Correct tax liability	708,068.47
Total overassessment	538,202.77
Amount barred by stat. of limitations	443,367.61
Amount subject to refund	94,835.16

20. No refund was made of any portion of the overassessment of $443,367.61 because that amount was barred by the statute of limitations, but on August 17, 1928, the commissioner refunded $94,835.16, together with interest thereon, of $25,302.80, being the difference between the total overassessment determined by him for the fiscal period January 1, 1918, to June 30, 1918, and the amount barred by the statute of limitations.

The commissioner issued a certificate of overassessment for the fiscal year ended June 30, 1919, showing the details of his computation by which he arrived at his final decision, as follows:

Tax assessed, calendar year 1919:	
Account #40809 (original)	$887,444.67
Account #408089 (tentative)	300,000.00

Total assessment	$1,187,444.67
Correct tax liability	896,314.83
Overassessment	291,129.84
Credited to abatement claim	73,935.26
Refunded	217,194.58

21. May 17, 1928, the commissioner refunded the amount of $217,194.58, together with interest thereon of $86,877.83. For the fiscal year ended June 30, 1920, the commissioner followed the same method and made the same adjustment for that year as is shown above in respect to the fiscal years ending June 30, 1918 and 1919.

22. At all times during the periods involved in this suit plaintiff kept its books on the basis of a fiscal year ending June 30 and kept its books of account and made its tax returns on an accrual basis.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law.

[fol. 20]

Opinion

Littleton, Judge, delivered the opinion of the court:

Plaintiff brings this suit to recover $556,754.72, alleged to represent an overpayment of income and profits tax for the last six months of the calendar year 1919, being the first six months of the fiscal taxable year beginning July 1, 1919, and ending June 30, 1920.

As shown by the facts, the commissioner held that the erroneous calendar year returns were returns under the statute for the fiscal year ending within such calendar year and treated the tax assessed and paid on such calendar year returns as having been paid on a return for such fiscal year. As a result, the Commissioner of Internal Revenue held that there had been no overpayment for the period

claimed by plaintiff. The result of the commissioner's determination upon audit of the returns for 1918, 1919, and 1920 was to show an overassessment of $538,202.77 for the six-months period ending June 30, 1918. Of this amount the refund of $443,367.61 was barred by the statute of limitation and the balance of $94,835.16 was duly refunded by the commissioner with interest.

Plaintiff contends that one-half of the tax paid under each of the erroneous calendar year returns must be regarded as having been paid for each of the two fiscal years involved in such erroneous return. It therefore claims that six-twelfths of the tax paid under the erroneous calendar year 1918 return should be treated as having been paid for the fiscal period ending June 30, 1918, and six-twelfths should be treated as a tax paid for the fiscal year ending June 30, 1919, and that the tax collected on the erroneous calendar year 1919 return should be similarly applied.

Defendant contends that the tax paid under any such erroneous return must be treated as a tax paid for the correct taxable period or year for which the return should have been filed and the tax paid, and that any overpayment should be refunded or credited against any tax due for another taxable period in the usual and ordinary manner expressly provided by statute in respect of overpayments.

The question for decision, therefore, is whether a taxpayer having erroneously filed a return or returns and paid the tax thereunder for a period other than that required by law is entitled to have the tax so paid apportioned between the two taxable years involved upon the basis of the respective number of months concerned which fall within each of the correct taxable years.

This question has been fully considered and discussed by the court in P. L. Mann v. United States, J-201, this date decided. For the reasons therein set forth we are of opinion that plaintiff is not entitled to recover any amount as an overpayment of tax for the fiscal year ending June 30, 1920.

The petition must therefore be dismissed. It is so ordered.

Williams, Judge; Green, Judge; and Booth, Chief Justice; concur.

Whaley, Judge, did not hear this case and took no part in the decision thereof.

[fol. 21] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 3rd day of November, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On December 31, 1930, the plaintiff filed a motion for a new trial.

On February 16, 1931, the plaintiff's motion for new trial was argued and submitted by Messrs. George E. Hamilton and William E. Hayes, for plaintiff, and by Mr. George H. Foster, for defendant.

On April 6, 1931, the plaintiff's motion for new trial was overruled, with an opinion by Littleton, J., which is as follows:

[fol. 22] VII. OPINION OF THE COURT BY LITTLETON, J., ON PLAINTIFF'S MOTION FOR NEW TRIAL—Filed April 6, 1931

Mr. George E. Hamilton and Mr. Wm. E. Hayes for the plaintiff.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

Memorandum

LITTLETON, Judge:

Plaintiff's petition was dismissed by opinion rendered November 3, 1930. Thereafter plaintiff filed a motion for a new trial and brief in support thereof.

It is insisted, first, that "the court erred in treating the calendar year 1919 statement of income as a statutory return for the fiscal year ended June 30, 1919," and secondly, that "the court erred in treating the tax paid on income of the twelve months' period ending December 31, 1919,

which period was not the taxable period, as if it were a payment made for a taxable year ending in such calendar year."

With respect to the first point the court held that when a taxpayer files a calendar-year return, when it should have filed a return for the fiscal year ending during such calendar year, such return, although on an erroneous basis, must be treated as a return under the statute, and it can only be treated as a return for a taxable period or year that has ended during the period covered by it.

On the second point the court decided that a tax assessed and paid on a return for a calendar year, when the true accounting period of the plaintiff was a fiscal year ending within that calendar year, must be regarded as having been assessed and paid for the fiscal taxable year ending within the year for which the return was filed, even although the taxpayer filed his return on the wrong basis.

In oral argument upon the motion for a new trial and in the brief in support thereof counsel for plaintiff contend that the calendar-year returns filed can not be regarded as returns under the statute for any purpose, since in neither form nor substance did they purport to contain the income for a fiscal year which was the taxpayer's annual accounting period and for which it was required by the statute to file returns. We can not concur in this contention. Except for the fact that plaintiff did not file sufficient and [fol. 23] timely claims for refund with respect to the tax paid on the calendar year 1918 return, there would be no basis whatever for the claimed overpayment for the fiscal year beginning July 1, 1919, and ending June 30, 1920, for the reason that had the commissioner not been prevented by the statute of limitation from refunding the entire overpayment determined for 1918, the plaintiff would have received the refund of all of the tax paid in excess of its correct tax liability for each of the fiscal years ended June 30, 1918, 1919, and 1920. The overpayment claimed by the plaintiff to have been made for the first six months of the fiscal year ended June 30, 1920, can only be supported by completely disregarding for all purposes the calendar-year returns filed and by treating each of them merely as a statement of income and deductions of the tax paid thereon as a tax for the first half

and the second half of plaintiff's fiscal taxable year. In other words, in order to bring the claimed overpayment within a period covered by a sufficient and timely claim for refund, one-half of the tax paid on each of the calendar year returns must be treated as an advance payment for the first six months of the fiscal year ending on June 30. We are of opinion, as pointed out in P. L. Mann v. United States, 44 Fed. (2d) 1005, that the calendar year returns must be treated as statutory returns for the fiscal year ending within the calendar year for which such returns were filed. The Commissioner of Internal Revenue correctly so held and adjusted the income, deductions, and the tax paid accordingly. Returns are not fatally defective merely because they do not include all of the income for the correct taxable period for which the returns should have been filed, or because they may include income which properly belongs in some other taxable period, or because the returns were made upon an erroneous basis. The treatment by the defendant of the calendar year returns as statutory returns for the taxable fiscal years ending within the calendar years for which such returns were improperly made for the purpose of assessment, collection, refunds, credits, and the statute of limitations was, in our opinion, a correct administration of the taxing act. The calendar year returns purported to and did cover a period recognized by the statute as a taxable year. The taxable year covered by each calendar year return did not include the entire taxable year of the plaintiff because its books were kept on a fiscal year basis. Each return was therefore made on an erroneous basis and included income and deductions of a portion of two of plaintiff's correct taxable years. When the commissioner came to audit the calendar year returns he discovered that the plaintiff was on a fiscal year basis and it was necessary for him to adjust the income returned, the deductions taken, and the tax paid to conform to the plaintiff's fiscal year. He did this by adjusting the income, deductions, and tax liability of the correct fiscal taxable year to the calendar-year returns covering the period in which the fiscal year ended. The commissioner would not have been justified in completely ignoring the calendar-year returns filed and in treating

the taxpayer as if it had never filed a return for any of the taxable years 1918 to 1920, inclusive. This conclusion is not inconsistent with Lucas v. Pilliod Lumber Co., 281 U. S. 245, where the taxpayer failed to sign and swear to a return. Nor is the case of Florsheim Brothers Drygoods Co., Ltd., v. United States, 280 U. S. 453, authority for the [fol. 24] contention of the plaintiff that calendar-year returns filed by a taxpayer keeping its books on the fiscal-year basis are without legal significance whatever and must be completely ignored. The Florsheim case involved the question whether a request for extension of time within which to file a return accompanied by an estimate of the total tax due for the year was a sufficient return to set in motion the statute of limitations. The holding of the court that such a document could not be considered a return under the statute can not be extended to include a complete calendar-year return filed by a taxpayer employing the fiscal-year basis of accounting.

We find no reason justifying a modification of the decision heretofore rendered. The motion for a new trial is, therefore, denied.

Whaley, Judge; Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 25] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,844. Court of Claims. Term No. 922. American Hide and Leather Company, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed April 29, 1931. File No. 35,844.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1276)

FILE COPY

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 62

AMERICAN HIDE AND LEATHER CO., PETITIONER,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

GEORGE E. HAMILTON,
WILLIAM E. HAYES,
Attorneys for the Petitioner.

PRINTED BY NATIONAL PUBLISHING COMPANY, WASHINGTON, D. C.

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No. 62

AMERICAN HIDE AND LEATHER CO., PETITIONER,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions of the Court of Claims (R. 27, 29) are reported in 48 F. (2d) 430, 434.

JURISDICTION

The judgment of the Court of Claims was entered on November 3, 1930. (R. 29.) A motion for a new trial was overruled April 6, 1931. (R. 29.) The petition for writ of certiorari was filed April 29, 1931, and certiorari was granted October 12, 1931. (R. 33.) The jurisdiction of this Court

is based upon Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

When a taxpayer makes a payment of taxes, which is intended to and does represent, and which the government so accepts and stipulates did represent, a tax upon the income of a specified twelve months' period, can such payment be subsequently treated as having been made for another and different period, embracing other and different income?

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, infra pp. 20, 21, 22.

STATEMENT

The petitioner filed returns of its income for the calendar years 1918, 1919 and 1920. The return of income for the calendar year 1918 was filed on July 15, 1919, and a tax of $1,246,271.24 on this income was paid during the year 1919. (R. 21.)

The return of income for the calendar year 1919 was filed on May 15, 1920, and a tax of $1,113,509.41 on this income was paid during the year 1920, the final payment being made on December 24, 1920. (R. 21.)

The return of income for the calendar year 1920 was filed on May 12, 1921, showing a net loss of $7,982,322.34, and no tax due. (R. 21.)

The petitioner's books of account, however, were kept upon the accrual basis of a fiscal year ending June 30, and its tax returns were made on an accrual basis. (R. 27.) The provisions of the Revenue Act of 1918, enacted February 24, 1919, required the petitioner to make its tax returns upon the basis of its annual accounting period—a fiscal year ending June 30. The petitioner, having properly filed its returns for the year 1917 on a calendar year basis (R. 22), its fiscal year 1918 was accordingly from January 1, 1918, to June 30, 1918, and its succeeding fiscal years were July 1, 1918, to June 30, 1919, and July 1, 1919, to June 30, 1920. In 1926, at the direction of the Commissioner of Internal Revenue (R. 15, 17), the petitioner filed the tax returns required by law of its income for the fiscal year ended June 30, 1919, and for the fiscal year ended June 30, 1920. (R. 24.) The latter return showed a net loss for the fiscal year July 1, 1919, to June 30, 1920, in the sum of $1,739,036.96. On January 6, 1927, nearly eight years after petitioner had filed a return of income for the calendar year 1918, the Commissioner advised the petitioner by letter that since no return had been filed for the fiscal year 1918, he requested the petitioner to file a fiscal return for that year. (R. 18.)

In accordance with this request of the Commissioner, petitioner, on February 1, 1927, filed its return for the fiscal period 1918, (January 1, 1918, to June 30, 1918) (R. 25), as required by Section 226 of the Revenue Act of 1918.

The Commissioner, after receiving the above mentioned fiscal year returns, adjusted the income of the calendar years 1918, 1919 and 1920 to their respective fiscal year periods, but refused to adjust the tax payments thereon in like manner.

The tax payments as made by the petitioner were adjusted by the Commissioner in the following manner: He treated the payments made on income returned for a calendar year as though they were payments made on a return of income for a fiscal year ending within the calendar year. Thus the payment on income for the calendar year 1918 was treated as though it was a payment on the income for the fiscal period January 1, 1918, to June 30, 1918, although it covered the additional period of income from July 1, 1918, to December 31, 1918, which period was in the next fiscal year. Thus the entire amount of $1,246,271.44, accepted by the Commissioner as a payment on income for the specific period, January 1, 1918, to December 31, 1918, was treated as though it were a payment for the period, January 1, 1918, to June 30, 1918, even though the tax liability determined by the Commissioner for the latter period was only $708,-068.47. The resulting difference, under the Commissioner's adjustment, was treated as an overpayment for the period, January 1 to June 30, 1918, instead of being treated as an accrued payment on accrued income for the period, July 1 to December 31, 1918.

Likewise, the $1,113,504.41 accepted by the Commissioner as a payment on income returned

for the calendar year 1919 was subsequently treated as though it were a payment on income for the fiscal year July 1, 1918, to June 30, 1919, even though the tax liability determined by the Commissioner was only $896,314.83. The Commissioner, by his adjustment, treated the difference as though it were an overpayment for the period, July 1, 1918, to June 30, 1919, instead of treating it as an accrued payment on accrued income for the period, July 1, 1919, to December 31, 1919.

By the above method the Commissioner has eliminated from the fiscal year 1920 all the tax paid on the income of the six months, July 1 to December 31, 1919, which six months' period is part of the fiscal year, July 1, 1919, to June 30, 1920. If the tax paid upon the income returned for the said six months is adjusted to the fiscal year 1920 in the same manner as the income has been adjusted, it will result in a refund to the petitioner for the fiscal year 1920, there being no tax liability for that year.

The petitioner computes a refund due for the fiscal year 1920 of $556,754.72, by allocating to this period one-half of the payment previously made on the income of the calendar year 1919.

Claim for refund of taxes paid on income for the period January 1, 1919, to December 31, 1919, was filed by petitioner on September 10, 1924. (R. 23.)

Claim for refund of taxes paid on income for the period July 1, 1919, to June 30, 1920, was filed by petitioner on September 15, 1925. (R. 23.)

The respondent's interests were at all times protected by waivers filed by the petitioner, beginning with a waiver for the year 1919, filed September 25, 1924. (R. 23.)

The Commissioner rejected petitioner's claims for refund and refused to refund any of the tax paid on income which accrued during the fiscal year 1920. This suit was brought in the Court of Claims on July 16, 1928. (R. 10.)

SPECIFICATIONS OF ERROR TO BE URGED

(1) The Court of Claims erred in holding that a payment made on a return of income for a calendar year must be treated as a payment on a return of income for a fiscal year.

(2) The Court of Claims erred in not giving judgment for the petitioner.

SUMMARY OF ARGUMENT

When a taxpayer pays taxes upon the income for a calendar year, the Commissioner of Internal Revenue is not warranted in subsequently treating the entire amount of such tax as having been paid for a fiscal year.

It is respectfully submitted that when the Commissioner of Internal Revenue adjusts the income accrued during the calendar year to the respective fiscal years contained therein, he must also adjust the tax accrued and paid upon income for the calendar year to the respective fiscal years during which the income accrued.

When the tax paid for the calendar year exceeds the tax liability for the fiscal year, the excess amount cannot be treated as having been overpaid for the fiscal year, but must be allocated to the period which contains the income upon which it accrued.

The contention that, because petitioner's calendar year returns must be treated as statutory returns for the fiscal years, petitioner's payments for the calendar years must be treated as payments for the fiscal years, is contrary to the provisions of Sections 212 (b) and 239 of the Revenue Act of 1918. Taxes are levied upon income, not upon returns. It is further respectfully submitted that even if the calendar year returns filed by petitioner must be treated as returns for the fiscal years, nevertheless, the Commissioner of Internal Revenue was not authorized to disregard the intention of the petitioner that its tax payments were made on specific income accrued during specified twelve months' periods, January 1 to December 31.

Proper claim for refund was filed within the meaning of Section 284 (h) of the Revenue Act of 1926 and within the rule laid down by this Court in *Burnet v. Willingham Loan and Trust Company*, 284 U. S. 437.

ARGUMENT

It is established that the petitioner overpaid its taxes. In a Memorandum to this Court the re-

spondent states "The record in this case discloses that the United States has been overpaid a substantial sum of money for taxes." The question before this Court is the determination of the period for which these taxes were overpaid.

In the Memorandum above referred to the respondent states "The method of allocation adopted by the Commissioner, and approved by the Court below, cannot be said to be entirely free from doubt" and "The situation is one which apparently was not contemplated and for which no provision is made by statute or regulation."

The issue, then, lies between the method adopted by the Commissioner of Internal Revenue and that contended for by this petitioner. The petitioner's method is to allocate to each proper fiscal year so much of the tax payments as were made on the income of each calendar year—thus a tax payment made for the calendar year from January 1 to December 31, 1919, which calendar year embraces six months of the fiscal year 1919 and six months of the fiscal year 1920, would be allocated one-half to the fiscal year 1919 and one-half to the fiscal year 1920. Using the same illustration, the theory adopted by the Commissioner of Internal Revenue holds that all the tax paid on the income of the calendar year 1919 should be deemed to have been paid on income for the fiscal year 1919, ending June 30, 1919.

The petitioner bases its contention that its method is the correct one, in the absence of specific direction in the Revenue Act, upon general

principles of law and upon the fact that it does not violate any of the provisions of the Revenue Act, while those provisions must of necessity be violated in order that the theory of the Commissioner of Internal Revenue and of the Court below may be maintained.

The petitioner, by its payment of taxes on income returned for the period January 1, 1919, to December 31, 1919, specifically applied such payment to the satisfaction of the taxes on the income for that specific period. Any adjustment of this payment by the Commissioner must be made on the basis upon which the tax was paid and received. The Collector was not warranted in originally accepting this payment of taxes on income accrued from January 1, 1919, to December 31, 1919, treating it as such until 1926 and then applying it as though it were a payment of taxes on income from July 1, 1918, to June 30, 1919, contrary to the petitioner's intention, when the respondent's rights are in no way prejudiced.

It is the petitioner's contention that taxes accrue upon and are inseparable from income, which position is supported by the decision of this Court in *Fawcus Machine Company v. United States*, 282 U. S. 375, wherein this Court held that:

> "A corporation cannot claim to have accumulated any net income in any year until provision is made for taxes accrued based on net income for the same year."

See also *Burnet v. Sanford & Brooks*, 282 U. S. 359; *Aluminum Castings Company v. Routzahn*, 282 U. S. 92; *United States v. Anderson*, 269 U. S. 422, and *Lynch v. Turrish*, 247 U. S. 241.

It is apparent that the income of this taxpayer for the calendar years 1918, 1919 and 1920 accrued during the twelve months' periods from January 1 to December 31, 1918, 1919 and 1920, respectively. The petitioner paid taxes computed upon the basis of the income reflected in and accrued during those periods. Therefore, when it was later determined by the Commissioner of Internal Revenue that the taxpayer, having kept its books upon an annual accounting basis of a fiscal year, should have made a return of its income on a fiscal year basis, the income which had already been reported for the calendar year was allocated to the fiscal year periods during which it accrued. To return to the illustration set forth above, the income accrued from January 1, 1919, to June 30, 1919, was held to have been income for the fiscal year 1919, and the income which accrued from July 1, 1919, to December 31, 1919, was held to have been income for the fiscal year 1920. If the petitioner is correct in its contention that income gives rise to taxes and that without income there can be no tax, then it follows that the taxes accrued and paid for the twelve months' period from January 1, 1919, to December 31, 1919, must be treated in the same manner as the income of that period.

The question of the method of allocating tax

payments involved in this case has arisen in several cases where a taxpayer has made returns upon a calendar year basis when they should have been filed on a fiscal year basis. It was first presented to the Board of Tax Appeals in the case of *Paso Robles Mercantile Co.*, 12 B. T. A. 750, which held at page 754:

> "The statute makes no provision with respect to the method of crediting taxes paid on returns filed on one basis when they should have been filed on another. The regulations of the Treasury Department are silent on the question. The Commissioner for a period used one method and subsequently changed to another. There are no decisions on the question. We are then left to considerations of reason and general principles.
>
> "In our opinion, a tax erroneously determined on a calendar year basis should be credited on the tax shown due on a fiscal year basis in proportion to the months in the respective calendar years making up the fiscal years. By this method eleven-twelfths of the tax shown on the basis of the calendar year 1920, for instance, should be credited to the fiscal year 1921, since eleven-twelfths of the calendar year 1920 is in the fiscal year 1921.
>
> "It is true that the income for a year is determined on an annual basis, but the

Supreme Court has found no difficulty in prorating the earnings of the year in order to determine the amount thereof available for dividends at a particular period within the year. See *Edwards v. Douglas*, 269 U. S. 304; *Mason v. Routzahn*, 275 U. S. 175; 38 Sup. Ct. 50.

"On the same principle we think that taxes might be prorated over the year in order to allocate to the respective periods of any calendar year a proportionate part thereof applicable to those periods when the tax paid on a calendar year basis is to be credited on the tax liability on a fiscal year basis."

The Board's decision in this case was affirmed by the Circuit Court of Appeals in *Paso Robles Mercantile Co.*, 33 Fed. (2d) 653, and certiorari was denied by this Court, 280 U. S. 595. The method of allocation was not presented to this Court on petition for certiorari. However, the Circuit Court of Appeals in its decision approved the method of allocation here contended for. The reasoning of the Circuit Court in reaching its conclusion is in conflict with the decision of the lower Court in the instant case as may be seen from the following extract from the opinion of the Circuit Court at page 654:

"He had no specific return for that period and in determining the amount he computed the tax from the two pertinent calen-

dar year returns. Finding to be due a total of $4,653.66, he credited thereon 11/12 of the tax petitioner had paid on the basis of its return for the calendar year 1918 and 1/12 of the amount paid on a like basis for 1919, and thus determined a net balance of $3,697.10. If the return made on April 14, 1919, for the 1918 calendar year, standing alone, be held effective as a return for that period it would be necessary to decide that the assessment of March 10, 1925, in so far as it related to the 1918 calendar year, was void for want of authority, more than five years having elapsed subsequently to the return. If, upon the other hand, such return be deemed ineffective for any purpose until supplemented by the return for the following calendar year because it covered only eleven months of the taxpayer's fiscal year, then the assessment of March 10, 1925, would be within the five year limitation period, for upon that theory there was no complete return for the fiscal year ending January 31, 1919, until the return for the 1919 calendar year was filed, on March 11, 1920. The Board of Tax Appeals adopted this latter view, and we think correctly."

The method of allocation sought by this petitioner has been the basis for decisions favorable to the Commissioner of Internal Revenue in the cases of *Jonas Cadillac Company v. Commissioner*

of Internal Revenue, 16 B. T. A. 932, affirmed by the Circuit Court of Appeals for the Seventh Circuit, 41 Fed. (2d) 141, and *Paso Robles Mercantile Company v. Commissioner of Internal Revenue, supra.* The Commissioner availed himself of this method in order that he might prevail in those cases, but refused, in the instant case, to admit its correctness.

This method of allocation has also been approved by the Board of Tax Appeals in the cases of *Lowenstein Bros. Garment Co. v. Commissioner*, 13 B.T.A. 48; *Paso Robles Mercantile Co. v. Commissioner*, 18 B.T.A. 415, and *Bradstreet Company of Maine v. Commissioner*, 23 B.T.A. 1093.

In the case of *Paso Robles Mercantile Co.*, 18 B.T.A. 415, a statement that no appeal would be taken by the government was published in Prentice-Hall Service 1930, Vol. 2, page 1839.

The method adopted by the Board of Tax Appeals is simply a measure of the tax by the income earned within each taxable period for which it should have been assessed and paid as contemplated by the Statute. Not having information as to what the actual accruals of income were, the Board adopted a prorata basis. Under a method of this kind the rights of the government are not prejudiced.

Solely by holding that the petitioner's tax payments should be treated as though they were paid for the fiscal years does the Commissioner of Internal Revenue create an overpayment in the fiscal year 1918.

The Court of Claims upheld the Commissioner's ruling that payments made on income for the calendar year must be regarded as though they were made for the fiscal year, upon the theory that petitioner's calendar year returns must be regarded as statutory returns for the fiscal year. We believe that the fundamental error of the Court of Claims is in its treatment of returns as the question of primary importance rather than the adjustment of specific payments on specific income.

It is respectfully submitted that even if the theory of the lower Court as to returns is sound, it is irrelevant to the question presented in the instant case. Taxes are levied and paid, not upon a return, but upon income for the period specified in the return.

However, in view of the fact that the Court below appears to arrive at this conclusion solely upon the basis of its interpretation of the petitioner's calendar year returns, it is respectfully submitted that the calendar year returns filed by the petitioner were not the returns required by statute and could not be treated as statutory returns for the fiscal years in the manner stated by the Court.

This Court held, in the case of *Florsheim Brothers Drygoods Company, Ltd. v. United States*, 230 U. S. 453, that a return—which in that case was a tentative return—which did not comply with Section 239 of the Revenue Act of 1918 was not a statutory return. In that case the return did not comply with Section 239 in that it did not purport

to be a specific statement of the items of income, deductions and credits in compliance with Section 239. (See also *Pilliod Lumber Company v. United States*, 51 Sup. Ct. 297.) In the instant case, no calendar year return filed by the petitioner purported to nor could have contained a specific statement of the items of income, deductions and credits for the fiscal year.

It is apparent that if the petitioner's calendar year returns are not statutory fiscal year returns, the conclusion of the Court of Claims based upon that premise is erroneous. It is further apparent that the 1918 overpayment was not created pursuant to a statutory return and the ruling of the Commissioner is, therefore, contrary to Section 250 (b) of the Revenue Act of 1918. The practical effect of the decision of the lower Court would be to abolish, at least in so far as the circumstances in this case are concerned, the distinction between a calendar and a fiscal year return and to negative the provisions of Sections 212 (b), 239 and 250 (b) of the Revenue Act.

There is a question raised by the respondent in its Memorandum filed with this Court concerning the timeliness of the claim for refund filed by the petitioner on September 15, 1925.

The respondent states that "* * *it may be contended that 'the return' within the meaning of Section 284 (h) is the return which the taxpayer should have made; that is, a return for the fiscal year ended June 30, 1920." The respondent further states "This return was due September

15, 1920, and if this is 'the return', the claim for refund filed September 15, 1925, was filed within the five-year period. *Burnet v. Willingham Loan and Trust Company*, 284 U. S. 437."

It is respectfully submitted that the petitioner is suing for an overpayment of taxes for the fiscal year 1920. Section 284 (h) of the Revenue Act of 1926 provides that a claim for refund must be filed within five years after the return is due. The petitioner's return for the fiscal year 1920 was due on September 15, 1920, and claim for refund was filed September 15, 1925, within the five year period prescribed by statute. See *Burnet v. Willingham Loan and Trust Company, supra.*

The respondent has stated that the petitioner is claiming a refund for the taxable year 1920, although it has at no time paid any tax on any return filed for either the calendar year 1920 or the fiscal year ending June 30, 1920. In so far as the fiscal year 1920 is concerned, the question as to whether or not the petitioner paid taxes for that year is the issue before this Court. It is submitted that six-twelfths of the tax paid for the calendar year 1919 was paid on income accrued during the fiscal year 1920 and was therefore a payment of taxes for the fiscal year 1920. In view of the fact that no tax was found to be due for the fiscal year 1920, the amount already paid should be refunded.

The Commissioner of Internal Revenue arrived at an overpayment for the fiscal period ended June 30, 1918, in the sum of $443,367.61—certain refunds having been made—based upon his compu-

tation of a tax liability for that period of $708,068.47 and a tax paid for the calendar year 1918 of $1,246,271.24. However, since this computation was made, the method used by the Commissioner to compute the tax liability has been abandoned by the Bureau of Internal Revenue, which has now adopted a principle of computation in accordance with Section 226 of the Revenue Act of 1918, as enunciated by the Board of Tax Appeals in the case of *Henry D. Weed*, 2 B. T. A. 85, in which the Commissioner has announced his acquiescence in V-1-C.B. 6. The same principle was reaffirmed in the cases of *W. B. Thompson*, 5 B. T. A. 193, *Acq.* VI-1-C.B. 6, and *Coghlin Electric Company*, 3 B. T. A. 1071, *Acq.* VI-1-C.B. 2. A computation of the tax liability in accordance with this principle would fix the true tax liability for the fiscal year 1918 at $554,415.86, and the overpayment, after deducting refunds made, at $597,020.22. This overpayment of $597,020.22 of taxes is an overpayment as of the fiscal year 1920 if petitioner's contention is sustained as to adjustment of tax payments. In other words, if the total payments of $2,339,780.65 were treated as a suspended account from which taxpayer's only obligations to the government were satisfied for the fiscal year 1918 in the sum of $554,415.86 and for the fiscal year 1919 in the sum of $896,314.83, the net balance of overpayment of taxes—certain refunds having been made—is in the sum of $597,020.22.

The above is set forth in order that, in the event the Court finds for the petitioner, it may be determined whether the judgment should be in the sum of $443,367.61 as originally computed by the Commissioner, or in the sum of $597,020.22 in accordance with the *Weed case, supra*, or in the sum of $556,754.72 in accordance with the method of allocation approved by the Board of Tax Appeals in *Paso Robles Mercantile Co. v. Commissioner of Internal Revenue*, 12 B. T. A. 750.

The effort of the petitioner now is, and at all times has been, to recover back an overpayment of taxes admittedly made, but withheld by a method of allocation contrary to law.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be reversed.

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November, 1931.

APPENDIX A

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, provides in part:

"SEC. 200. That when used in this title—

The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under Section 212 or Section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. * * *"

"SEC. 212 (b). The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *"

"SEC. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall

be made for the period between the close of the last fiscal year for which return was made and the following December 31. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. * * *

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; * * *."

"SEC. 230 (a). That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates; * * *."

"SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *.

Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (c) of section 236 shall be reduced to an amount which bears the same ratio to the full credit

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therein provided as the number of months in the period for which such return is made bears to twelve months."

"SEC. 250 (b). As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. * * *."

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part:

"SEC. 284 (h). Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due."

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paid the tax shown by these returns. Since the petitioner's books were kept on the basis of a fiscal year ending June 30th, its returns should have been made upon the basis of its fiscal year. On these facts two questions arise:

1. Whether, in adjusting the taxes upon the fiscal year basis, the Commissioner should allocate any part of the payments of taxes originally assessed and paid for the calendar year 1919 to the fiscal year 1920.

2. Whether the petitioner's claim for refund filed September 15, 1925, was too late to support recovery of any part of such tax payments if they should have been allocated to the fiscal year ending in 1920.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 11–13.

STATEMENT

The petitioner filed returns for the years 1918, 1919, and 1920 upon the calendar year basis. The return for the calendar year 1918 was filed on July 15, 1919, and the tax disclosed by this return was paid during the year 1919. (R. 21.) The return for the calendar year 1919 was filed on May 15, 1920, and the tax disclosed by this return was paid during the year 1920, the final payment being made on December 24, 1920. (R. 21.) The return for the calendar year 1920 was filed on May 12, 1921. (R. 21.) This return showed no net income and no tax. (R. 21.)

The petitioner's books of account were kept upon the basis of a fiscal year ending June 30 (R. 27), and accordingly under the provisions of Section 212 (b) of the Revenue Act of 1918 (*infra*, pp. 11–12) its returns should have been made upon the basis of its fiscal year. In 1926 the petitioner filed amended returns for the fiscal year ended June 30, 1919, and for the fiscal year ended June 30, 1920 (R. 24), together with claims for refund based thereon (R. 25). The latter return indicated a net loss for the fiscal period. The petitioner computed a refund due of $556,754.72 by allocating to this period one-half of the payment previously made for the calendar year 1919.

The Commissioner of Internal Revenue refused to adopt the allocation of payments made by the petitioner and adjusted the payments to the tax disclosed as due on the amended fiscal year returns in the following manner: He treated the calendar year returns as returns for the taxable year ending within the calendar year for which the return was made. Thus the return for the calendar year 1918 was treated as a return for the fiscal period January 1, 1918, to June 30, 1918, although it covered the additional period from July 1, 1918, to December 31, 1918. The tax paid on the 1918 calendar year return was treated as a payment of the tax due for the fiscal period ended June 30, 1918. This resulted in a considerable overpayment for the fiscal period ended June 30, 1918. $94,835.16 of this sum had been paid

in 1924 within the statutory period for filing claims for refund, and this amount, with interest, was refunded to the petitioner; the balance of $443,367.61 was held to be barred from refund. (R. 26.) The Commissioner then allocated the payments made on the 1919 calendar year return to the tax due for the fiscal year ended June 30, 1919. This resulted in an overpayment of the tax for the fiscal year 1919, which was refunded to the petitioner. Since no tax had been paid on the calendar year 1920 return and no tax was disclosed as due on the return for the fiscal year 1920, no adjustment was made for this period. The adjustments made by the Commissioner are summarized in the footnote.[1]

The petitioner contended that the payments which it had made on the calendar-year basis should be applied to the fiscal-year tax by allocating the calendar-year payments according to the number of months of the fiscal year contained in the calendar year. Thus, the petitioner contended that the payment for the calendar year 1918 should be allocated one-half to the fiscal year ending June 30, 1918, and one-half to the fiscal year commencing

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[1] Fiscal period January 1, 1918, to June 30, 1918:

Total tax assessable	$708,068.47
Tax previously assessed (calendar year 1918)	1,246,271.24
Overassessment	538,202.77
Fiscal year ending June 30, 1919:	
Total tax assessable	896,314.83
Tax previously assessed (calendar year 1919)	1,187,444.67
Overassessment	291,129.84
Fiscal year ending June 30, 1920:	
Total tax assessable	None.
Tax previously assessed (calendar year 1920)	None.

July 1, 1918. In the same manner, it contended that the tax paid for the calendar year 1919 should be allocated one-half to the fiscal year ending June 30, 1919, and one-half to the fiscal year commencing July 1, 1919. Since the return filed for the latter fiscal year disclosed no tax due, the petitioner sought to have refunded to it one-half the tax paid for the calendar year 1919, which it contended should be treated as a payment for the fiscal year commencing July 1, 1919.

The petitioner's claim for refund filed on this ground was rejected August 10, 1927.[2] (R. 25.) This suit was brought in the Court of Claims on July 16, 1928, to recover the amount sought in the claim for refund for the period ending June 30, 1920.

DISCUSSION

I

This case presents a problem which has arisen in several cases where a taxpayer has made its re-

[2] In its petition in the Court of Claims the petitioner did not allege the filing of a claim for refund on September 15, 1925. Instead, it alleged the filing of a claim for refund on January 22, 1926. (R. 13.) But in its findings the Court of Claims included a finding that a claim for refund was filed September 15, 1925. (R. 23.) Although the findings do not show that the present ground was asserted in that claim for refund an examination of the record in the court below discloses that the claim for refund was filed and that in it the petitioner did rely upon the ground on which it now seeks recovery. Under these circumstances the Government is not disposed to rely upon the fact that the petitioner failed to allege the filing of this claim for refund in its petition in the Court of Claims.

turns upon a calendar year basis when they should have been made upon a fiscal year basis. The petitioner contends that the payments made on the calendar year returns should be allocated to the fiscal year tax due in proportion to the number of months of the calendar year contained in the fiscal year. This method received the approval of the Board of Tax Appeals in *Paso Robles Mercantile Co.* v. *Commissioner*, 12 B. T. A. 750, in *Paso Robles Mercantile Co.* v. *Commissioner*, 18 B. T. A. 415, and *Bradstreet Company of Maine* v. *Commissioner*, 23 B. T. A. 1093, although some inconsistency with these holdings appears in the opinion of the Board in *W. H. Hill Co.* v. *Commissioner*, 23 B. T. A. 605. The decision of the Board in the first *Paso Robles Mercantile Company* case, *supra*, was affirmed by the Circuit Court of Appeals for the Ninth Circuit (33 F. (2d) 653), and this Court denied certiorari (280 U. S. 595). Although the method of allocating payments under an erroneous calendar year return to the proper fiscal year was not presented to the Circuit Court of Appeals, or to this Court on petition for certiorari, the Circuit Court of Appeals held that the statute of limitations did not commence to run against the Commissioner's reassessment upon a fiscal year basis until calendar year returns covering the entire fiscal year had been filed. The reasoning of the court in reaching this conclusion appears to be in conflict with the reasoning of the court below in the instant case.

The Commissioner's method of allocation has been upheld by the Court of Claims in the present case and in *Mann* v. *United States*, 44 F. (2d) 1005. On June 1, 1931, this Court denied certiorari in *Mann* v. *United States*, No. 875, October Term, 1930, but the Government in its brief in opposition relied wholly upon the fact that the taxpayer's claim for refund was not filed in time, even if the Commissioner's allocation were not deemed correct.

The situation is one which apparently was not contemplated and for which no provision is made by statute or regulation. We believe that while the question is close, persuasive argument can be made that the Commissioner's method of allocation is not unreasonable and therefore should be sustained. Furthermore, it is to be noticed that the taxpayer is claiming a refund for the taxable year 1920, although it has at no time paid any tax on any return filed for either the calendar year 1920 or the fiscal year ending June 30, 1920.

II

A further question will remain even if it should be decided that the petitioner's contentions as to the proper allocation of the tax payments are correct.

Section 284 (b) (1) of the Revenue Act of 1926 (*infra*, p. 12) provides that no refund shall be made

> after four years from the time the tax was paid * * * unless before the expiration of such period a claim therefor is filed by

> the taxpayer [with certain exceptions not here important].

It is further provided, in Section 284 (h) of the Revenue Act of 1926 (*infra*, p. 13) that the provisions of Section 284 shall not

> bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

The petitioner paid the sum of $1,113,509.41 during the year 1920. The final payment of this sum was made on December 24, 1920. (R. 21.) It is part of this sum which the petitioner is now seeking to recover. The claim for refund upon which the petitioner now relies was not filed until September 15, 1925 (R. 23), more than four years after the payment was made. Thus, since the claim was filed more than four years after the tax was paid, recovery can not be had under Section 284 (b) (1) of the Revenue Act of 1926, *supra*.[8]

---

[8] Moreover, the taxpayer can not succeed by virtue of the following provision in Section 284 (g) of the Revenue Act of 1926:

> If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid.

Although a claim for refund was filed before April 1, 1927, the waiver which the taxpayer filed in respect of the taxable year 1920 was not filed until December 15, 1926. (R. 23.) The provisions of Section 284 (g), *supra*, apply only if the waiver was filed before June 15, 1926.

Consequently there can be no recovery unless the claim is within Section 284 (h) of the Revenue Act of 1926, *supra*, which allows recovery if the claim for refund was filed "before the expiration of five years after the date the return was due." The money which the petitioner seeks to have refunded to it was money paid under a return for the calendar year 1919. Returns for that calendar year were due on March 15, 1920. Section 227 (a) of the Revenue Act of 1918 (*infra*, p. 12). If this is "the return" within the meaning of Section 284 (h) of the Revenue Act of 1926, the claim for refund which the petitioner filed on September 15, 1925, was clearly not filed in time.

But it may be contended that "the return" within the meaning of Section 284 (h) is the return which the taxpayer should have made; that is, a return for the fiscal year ended June 30, 1920. This return was due September 15, 1920, and if this is "the return" the claim for refund filed September 15, 1925, was filed within the five-year period. *Burnet v. Willingham Loan & Trust Co.*, 282 U. S. 437.

CONCLUSION

The record in this case discloses that the United States has been overpaid a substantial sum of money for taxes. The Commissioner's allocation of payments to the fiscal year ending June 30, 1918, resulted in an overpayment of $443,367.61, which could not be recovered because it was too late to file a claim for refund when the allocation was

made. This overpayment is not involved in this suit, but the Commissioner's refusal to allocate any of the payments to the fiscal year ending June 30, 1920, has defeated the petitioner's claim of overpayment in that year. The method of allocation adopted by the Commissioner, and approved in the court below, can not be said to be entirely free from doubt. Nor is it entirely clear that the petitioner's claim for refund filed September 15, 1925, was too late.

Under all the circumstances of this case, the United States, without confessing error or conceding any of the petitioner's contentions, and reserving all questions for hearing in this Court, does not oppose the granting of the writ.

Respectfully submitted.

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SEPTEMBER, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1058, 1064, 1075, provides in part:

> SEC. 200. That when used in this title—
>
> The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year to be called the taxable year 1918 shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918; * * *.
>
> SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual account-

ing period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

Section 284 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 68, provides in part as follows:

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

U. S. GOVERNMENT PRINTING OFFICE: 1921

FILE COPY

No. 62

In the Supreme Court of the United States

OCTOBER TERM, 1931

AMERICAN HIDE AND LEATHER COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Court of Claims (R. 27, 29) are reported in 71 C. Cls. 114, 123, and in 48 F. (2d) 430, 434.

JURISDICTION

The judgment of the Court of Claims was entered on November 3, 1930. (R. 29.) A motion for a new trial was overruled on April 6, 1931. (R. 29.) The petition for certiorari was filed April 29, 1931 (R. 32), and the writ was granted October 12, 1931 (R. 33). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioner filed tax returns for the years 1918 and 1919 upon the calendar-year basis and paid the tax shown by these returns. Since the petitioner's books were kept on the basis of a fiscal year ending June 30th, its returns should have been made upon the basis of its fiscal year. On these facts two questions arise:

1. Whether, in adjusting the taxes upon the fiscal-year basis, the Commissioner erred in failing to allocate any part of the payments of taxes originally assessed and paid for the calendar years 1918 and 1919 to the fiscal year 1920, so that they might be recovered under a claim for refund of taxes for the fiscal year 1920.

2. Whether the petitioner's claim for refund filed September 15, 1925, was too late to support recovery of any part of such tax payments if they should have been allocated to the fiscal year ending in 1920.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 22–26.

STATEMENT

On July 15, 1919, the petitioner filed an income and excess profits tax return, reporting income for the calendar year 1918. Based on the income reported, a total tax of $1,151,436.08 was shown. This amount was assessed and payment was made in installments during the year 1919. (R. 21.) In

August, 1920, an additional tax in the amount of $301,183.38 was assessed for 1918. (R. 22.) On November 3, 1920,[1] the petitioner filed a claim in abatement of the additional assessment and payment was not then made. (R. 22.) Later a further additional assessment of $425,643.35 for 1918 was proposed, but this assessment was not made. (R. 22.) On February 18, 1924, the assessment for 1918 was reduced by the issuance of a certificate of overassessment in the amount of $206,348.22. The total assessment then standing against petitioner for 1918 was $1,246,271.24, of which payment had been made during 1919 of $1,151,436.08. By a payment of $94,835.16 on March 1, 1924, the petitioner discharged its assessed liability for 1918. (R. 23.)

On May 15, 1920, petitioner filed an income and excess-profits tax return reporting income for the calendar year 1919. (R. 21.) Based on the income reported, a total tax of $1,187,444.67 was shown. This amount was assessed and the petitioner paid in installments during the year 1920, a total of $1,113,509.41, and a claim in abatement was filed for the remainder, $73,935.26. The claim in abatement was based on an amendment of the return, due to a reduction in inventory. (R. 21.)

On May 12, 1921, petitioner filed an income and excess-profits tax return showing a net loss for the calendar year 1920. No tax was therefore paid. (R. 21.)

---

[1] R. 22 erroneously shows November 3, 1926.

Thereafter the petitioner filed various waivers and claims for refund looking to an adjustment of its tax liability on the calendar-year basis. On September 15, 1925, it filed a claim for refund of the tax claimed to have been paid for the period June 30, 1919, to June 30, 1920. (R. 23, 24.) On January 22, 1926, petitioner filed an amended return for the fiscal year ended June 30, 1919. This return showed a tax due for that period of $858,205.88, and a claim for refund was filed on that date claiming a refund of the amount by which the sum of one-half of the payment for 1918 and one-half of the payment for 1919 exceeded the tax shown on the amended return. (R. 24.)

On the same date, January 22, 1926, petitioner filed a similar return for the fiscal year ended June 30, 1920. This return showed a net loss of $1,739,036.96, and no tax was shown due. A claim for refund was filed on that date claiming a refund for this period of one-half of the payment for 1919. (R. 24, 25.)

On February 1, 1927, petitioner filed a claim for refund for the fiscal period January 1, 1918, to June 30, 1918, supported by an amended return for that period. This return showed a tax for this six months' period of $544,415.86. The refund claimed was the difference between one-half of the amount paid for 1918 and the amount shown on this return. (R. 25.)

The Commissioner of Internal Revenue determined that petitioner's returns should have been on the fiscal-year basis as indicated, as its books were kept on such a fiscal-year basis. The correct tax liability for each of the periods involved was then determined by the Commissioner to be—

$708,068.47 for the period Jan. 1, 1918, to June 30, 1918.

$896,314.83 for the fiscal year July 1, 1918, to June 30, 1919.

No tax for the fiscal year July 1, 1919, to June 30, 1920.

The Commissioner applied the total payment made in discharge of the 1918 assessment, $1,246,271.24, as in settlement of the tax liability of $708,068.47 determined for the period ended June 30, 1918, and issued a certificate of overassessment for $538,202.77. Of this amount, $94,835.16, paid in 1924, was refunded, together with interest thereon, as having been paid within four years of the claim for refund filed February 1, 1927. The balance not having been claimed in a timely claim for refund was held barred from refund. (R. 26.)

The Commissioner applied the total payment made in discharge of the calendar year 1919 assessment, $1,113,509.41, as in settlement of the tax liability of $896,314.83 determined for the period ended June 30, 1919, and issued a certificate of overassessment for $291,129.84. Of this amount, $73,935.26 had not been paid, as it was covered by

a claim for abatement. The claim for abatement was allowed in full and the remainder, $217,194.58, together with interest thereon, was refunded. (R. 26, 27.) Waivers were filed extending the period of limitation, and within this extended period the claim for refund was filed January 22, 1926.

No assessment had been made for 1920 and no certificate of overassessment was issued for that year.

The petitioner does not question the Commissioner's ruling that the determined overpayment for 1918 was barred. The petitioner questions the correctness of the application of payments which it made, based on the calendar year returns first filed. A computation showing the application of payments made by the Commissioner and as contended for by the petitioner follows.

The Court of Claims upon these facts dismissed the petition.

Application of Payments

1918

As made by the Commissioner:	
Amount paid against 1918 assessment	$1,246,271.24
Correct tax determined for fiscal period Jan. 1 to June 30, 1918	708,068.47
Overpayment for 1918	538,202.77
Refunded (with additional interest of $25,302.80)	94,835.16
Held barred by limitations	443,367.61
As contended for by Petitioner:	
Correct tax determined for period of Jan. 1 to June 30, 1918	708,068.47
Amount paid for 1918—One-half of 1918 payment ($1,246,271.24)	623,135.62
Underpayment	84,932.85

1919

As made by the Commissioner:		
Amount paid against 1919 assessment—		
Assessment	$1,187,444.67	
Not paid but under claim for abatement	73,935.26	
		$1,113,509.41
Correct tax determined for fiscal year July 1, 1918, to June 30, 1919		896,314.83
Amount refunded (with additional interest of $86,877.83)		217,194.58
As contended for by Petitioner:		
Amount paid for 1919:		
One-half of 1918 payment ($1,246,271.24)	$623,135.62	
One-half of 1919 payment ($1,113,509.41)	556,754.70	
		1,179,890.32
Correct tax determined for fiscal year July 1, 1918, to June 30, 1919		896,314.83
Overpayment		283,575.49
Refunded		217,194.58
Unrefunded		66,380.91

1920

Commissioner determined no payments and no tax liability for 1920.	
As contended for by Petitioner:	
Amount paid for 1920—One-half of 1919 payment ($1,113,509.41)	556,754.70
Correct tax determined for fiscal year July 1, 1919, to June 30, 1920	None.
Overpayment	556,754.70
Amount for which suit is brought.	

SUMMARY OF ARGUMENT

I

The petitioner filed its return for 1918 upon the calendar-year basis. Its later amended return for that year upon the fiscal-year basis indicated that it had overpaid its taxes for the fiscal period end-

period January 1, 1918, to June 30, 1918. Section 205, Revenue Act of 1918. The total tax ultimately assessed for this taxable fiscal period was $708,068.47. The petitioner had paid $1,246,271.24 under its erroneous calendar-year return for 1918. Of this amount, $708,068.47 was due upon income received during the true taxable year 1918. This resulted in an overassessment of $538,202.77; $94,835.16 of this had been paid in 1924 and was refunded. The repayment of the remainder, $443,367.61, was barred by the statute of limitations. The claim for its refund, suggesting the fiscal-year basis for the computation of the tax for the first time, was not filed until Februrary 1, 1927, more than four years after the payment of the amount assessed on the return as filed (Section 284 (b) (1) of the Revenue Act of 1926, c. 27, 44 Stat. Sec. 66, 68; *infra,* p. 26), and more than five years after the date of filing of the return for the calendar year 1918 under which the tax was paid (Section 284 (h) of the Revenue Act of 1926; *infra,* p. 26).

A similar situation existed as to the year 1919. The taxpayer filed a calendar-year return and paid taxes assessed on that basis of $1,113,509.41. (R. 21.) Upon readjustment to the fiscal-year basis the correct tax liability was determined to be $896,314.83. Under valid claims for refund $291,129.84 was refunded for this year. In 1920 petitioner's business was operated at a loss so that the readjustment of the returns from the calendar year to the fiscal

year did not change the ultimate situation. No tax was due under either method.

The petitioner filed its claim for refund for 1918 taxes too late. The tax can not be recovered, however deserving its case on the merits. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. This, we submit, is the real issue before this Court. The petitioner does not directly contest this point. It does not argue that it should recover the 1918 overpayment as such. It accepts the inevitable and attempts to obtain the refund by a more devious method. But an analysis of this method indicates that the ultimate object is to obtain this 1918 overpayment.

The petitioner contends that its payment for the entire calendar year 1918 should be equally divided, and half arbitrarily allocated as a payment of the tax upon income received in the last half of 1918, from July 1 to December 31, 1918. This is urged without any showing that its income was equally distributed throughout the year. In fact, seasonal business resulted in the receipt of income during the first six months of 1918, on which a tax was assessed of $708,068.47. This was the correct tax based on the income for that period. It was approximately 7/12ths of the total tax paid for the calendar year 1918. The arbitary allocation of 6/12ths of the tax to that period without regard to income is contrary to the reasoning of several court decisions. *Commisisoner* v. *Pittsburgh Knife & Forge Co.*, 30

F. (2d) 522 (C. C. A. 3d); *Commissioner* v. *Ragley Lumber Co.*, 30 F. (2d) 683 (C. C. A. 5th). See *Daily Pantagraph, Inc.*, v. *United States*, 282 U. S. 813.[1]

The conclusion reached is obviously unsound. The correct tax liability for the fiscal period 1918 (January 1, 1918, to June 30, 1918) is admittedly $708,068.47. Under the petitioner's theory there would be allocated to the payment of this liability only one-half of the amount paid for the calendar year 1918, or $623,135.62. This results in an underpayment for that period of $84,932.85. This is insisted upon, although the collection by the Government of the underpayment of $84,932.85 for 1918 has long been barred. By carrying this method of reallocation through the three taxable years in question, the petitioner seeks ultimately a refund of $556,754.72 for the fiscal year ending June 30, 1920. Only by this labored process is the taxpayer able to convert overpayments for two calendar years into an underpayment for one year and overpayments for two other years.

In place of the taxpayer's application of the tax payment by arbitrarily allowing six-twelfths of

[1] See *De Haven Mfg. Co.* v. *United States*, 31 F. (2d) 999 (E. D. N. Y.); and *Ennis-Brown* v. *Commissioner*, 10 B. T. A. 1248, where the taxpayers were not permitted to divide a loss in a taxable year into twelve equal parts so as to allocate certain twelfths to the period set out in Section 204 (b) of the Revenue Act of 1918 and deduct such parts of the 1919 losses from 1918 gains under the provisions of that Section.

the tax paid for the calendar year 1918 to the taxable period ending June 30, 1918, it would have been more reasonable to allocate the payments according to income actually received by the petitioner during the fiscal period. If this had been done, no underpayment for the fiscal year 1918 would have resulted. But the petitioner does not urge this theory, and if the contention were made it would be unsound. The taxpayer can not insist upon an application of payment based on an accurate computation of income, for this would involve the determination of tax liabilities for six-month periods. Taxable years are separate units and the income tax is to be computed upon net income for annual accounting periods. See *Commissioner* v. *Sanford & Brooks Co.*, 282 U. S. 359.

The Revenue Act of 1918 (and all other revenue acts) provides, by Section 230, that a tax shall be levied, collected, and paid "for each taxable year" upon the income of corporations. Section 200 of the Revenue Act of 1918 defines the taxable year to be the calendar year or a fiscal year ending within the calendar year. The net income upon which the tax is levied is defined to be, generally, all the receipts or accruals within the taxable year, less expenses paid or incurred during the taxable year. The corporation is required to make a return showing such items. The amount shown on the return is then payable by the corporation in one payment or in quarterly payments.

Thus, without regard to the accounting period involved, which depends on the corporation's bookkeeping, the tax is imposed and assessed for the taxable year on the income for the taxable year, and when paid is a payment for that particular taxable year. Payments made for one taxable year must be treated as payments for that taxable year notwithstanding the fact that certain items of income have been erroneously included therein, or excluded therefrom. If such items have been erroneously included, and a refund is sought of the resultant overpayment, the refund claim must be addressed to that taxable year and its allowance is to be determined by the statutes relating to that taxable year. Taxes are assessed for definite taxable years, and such taxable years are units not subject to division. It is only by such identification of payments to liabilities that full force can be given to the many provisions relating to refunds and credits. These are not the same for all taxable years. (See Section 252, 1921 Act; Section 281 (e), 1924 Act, as amended by the Act of March 3, 1925; all subsequently reenacted by Section 284 of the Revenue Act of 1926.)

Furthermore, as the court below pointed out in *Mann* v. *United States*, 71 C. Cls. 31, 44 F. (2d) 1005, certiorari denied, 283 U. S. 860, the calendar-year returns must be treated as statutory returns for the proper fiscal year. The court said (p. 1008):

> When a taxpayer files a calendar-year return when he should have filed a return for

> the fiscal year ending during such calendar year, this return, although erroneous, must be treated as a return under the statute, and it can only be treated as a return for a taxable period or year that has ended during the period covered by it. It can not be treated as a return for a portion of two taxable years, for there is no authority in the statutes or in the regulations for such a return, and, if it were regarded as a return for two periods, each falling in separate taxable years, it could not be treated as a return for any purpose under the statute. It would therefore necessarily follow that a tax assessed and paid on a return for a calendar year, when the true accounting period of plaintiff was a fiscal year ending within that calendar year, must be regarded as having been assessed and paid for the fiscal year, even although the taxpayer filed his return on the wrong basis. If this were not true, it would be necessary to construe the provisions of section 284 (a) of the Revenue Act of 1926 as authorizing the credit of an amount overpaid for one taxable year to a tax due for the same taxable year. Obviously no such construction can be placed on section 284 (a). Under plaintiff's contention, a credit would be made every time an adjustment is made for a taxable year for any reason.

The taxpayer in this case overpaid its 1918 tax liability. Upon ascertainment of that fact the Commissioner was authorized to make a credit of

any such overpayment against taxes due for any other period. Overpayments for one year can not be treated as payments for the subsequent year.

The petitioner relies upon *Paso Robles Mercantile Co.* v. *Commissioner,* 12 B. T. A. 750, affirmed on other points not raised in the instant case, 33 F. (2d) 653 (C. C. A. 9th), certiorari denied, 280 U. S. 595, and subsequent Board decisions. Although the actual decision in these cases is not on the precise issue involved here, the Board reached these decisions on reasoning in conflict with that of the court below in the instant case, but stated that it found no authority of law or regulations to support its position. The matter of the allocation of payments was not before the Circuit Court of Appeals. The Board of Tax Appeals has apparently followed its decision in the *Paso Robles* case in subsequent cases, but in the case of *W. H. Hill Company* v. *Commissioner,* 23 B. T. A. 605, a different position was taken by the Board.

The petitioner here complains that the Commissioner of Internal Revenue was without authority to apply the payments contrary to the expressed intention of the taxpayer at the time of payment, yet the taxpayer is now seeking a refund of taxes for the year 1920, when as a matter of fact no sum of money was paid by the petitioner for either the calendar year 1920 or the fiscal year ending June 30, 1920. Its claim filed September 15, 1925, was for the refund of taxes for the fiscal year end-

ing June 30, 1920. No such taxes had been paid. The only way the petitioner can show an overpayment for the year 1920 is arbitrarily to assign to that year one-half of the payment made for the calendar year 1919. This it claims it can do because on a fiscal basis a return for the taxable year 1920 should have included income received during the last six months of 1919, without any showing whatever as to whether any income was received during the last six months of the year 1919.

We submit that the payments should be treated as payments in liquidation of tax liability based on the liability created by the statute. Taxes are assessed for taxable years and payments must follow such assessments. The action of the Commissioner in the present case was a reasonable method of handling a situation caused by the petitioner's failure to comply with the express direction of Section 212(b) of the Revenue Act of 1918 (*infra*, pp. 22–23). It is not contrary to any provisions of the statute or regulations, and accordingly it should be upheld.

The petitioner in its brief (Pet. Br. pp. 18, 19) suggests that under later rulings of the Bureau of Internal Revenue based on decisions of the Board of Tax Appeals the correct tax liability for the period January 1, 1918, to June 30, 1918, should be $554,415.86 instead of $708,068.47. This question is not before the court. The correct tax liability

for this period has never been an issue in this case, but if it were, the findings of the Court of Claims establish the liability to be $708,068.47.

II

IF THE PETITIONER DID OVERPAY ITS TAXES FOR THE FISCAL YEAR ENDING JUNE 30, 1920, RECOVERY OF THE OVERPAYMENT IS BARRED BECAUSE THE CLAIM FOR REFUND WAS FILED TOO LATE

Section 284 (b) (1) of the Revenue Act of 1926 (*infra*, p. 26) provides that no refund shall be made

> after four years from the time the tax was paid * * * unless before the expiration of such period a claim therefor is filed by the taxpayer (with certain exceptions not here important).

It is further provided, in Section 284 (h) of the Revenue Act of 1926 (*infra*, p. 26), that the provisions of Section 284 shall not

> bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

The petitioner paid the sum of $1,113,509.41 during the year 1920. The final payment of this sum was made on December 24, 1920. (R. 21.) It is part of this sum which the petitioner is now seeking to recover. The claim for refund upon which the petitioner now relies was not filed until September 15, 1925 (R. 23), more than four years after the payment was made. Thus, since the claim was

filed more than four years after the tax was paid, recovery can not be had under Section 284 (b) (1) of the Revenue Act of 1926, *supra*.[3]

But the petitioner contends that the claim was filed within time under the provisions of Section 284 (h) of the Revenue Act of 1926, *supra*, which allows recovery if the claim for refund was filed "before the expiration of five years after the date the return was due." It argues that it should have made a return on the basis of a fiscal year ending June 30, 1920, that such a return would have been due on September 15, 1920, and that therefore the claim filed September 15, 1925, was within time. Under *Burnet* v. *Willingham Loan & Trust Co.*, 282 U. S. 437, it is clear that the claim filed on September 15, 1925, is within the five-year period if September 15, 1920, was the due date from which the period started to run.

But this argument disregards the important fact that the tax, recovery of which is sought, was paid

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[3] Moreover, the taxpayer can not succeed by virtue of the following provision in Section 284 (g) of the Revenue Act of 1926:

"If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid."

Although a claim for refund was filed before April 1, 1927, the waiver which the taxpayer filed in respect of the taxable year 1920 was not filed until December 15, 1926. (R. 23.) The provisions of Section 284 (g), *supra*, apply only if the waiver was filed before June 15, 1926.

under a return for the calendar year 1919, and this return was due March 15, 1920. We submit that the statute means by "the return" the return which was actually filed and under which the tax was paid. This clearly appears when the history of Section 284 (h) of the Revenue Act of 1926, *supra*, is considered. The phrase "the return was due" first made its appearance in the revenue laws in Section 252 of the Revenue Act of 1918 (*infra*, pp. 23–24) where it was provided:

> That if, upon examination of any return * * * it appears that an amount of income * * * tax has been paid in excess of that properly due, then * * * the amount of the excess shall be credited [or refunded] * * *: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

From this it is plain that "the return" is the return of which "examination" has been made, and the only return which is subject to "examination" is the return which has actually been filed. The same provision was continued in Section 252 of the Revenue Act of 1921 (*infra*, pp. 24–25). The period of limitation thus established for returns filed for the taxable years 1919 and 1920 was again continued by Section 281 (f) of the Revenue Act of 1924 (*infra*, pp. 25–26), and by Section 284 (h)

of the Revenue Act of 1926 (*infra*, p. 26), which is the section now in question.

We submit that the words "the return" are used in the latter section in just the sense in which they were used in Section 252 of the Revenue Act of 1918, *supra*, and that consequently "the return" is the return which was actually filed and under which taxes were paid. That return was due March 15, 1920. The claim for refund filed September 15, 1925, was therefore filed too late, and this suit can not be supported.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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NOVEMBER, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1058, 1064, 1075, 1085, provides in part:

SEC. 200. That when used in this title—

The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918; * * *.

SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual account-

ing period is other than a fiscal year as defined in section 200, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the pro-

visions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 268, provides as follows:

> SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five

years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under section 252 of the Revenue Act of 1918.

Section 281 (f) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 302 (U. S. C., Title 26, sec. 1065), provides as follows:

SEC. 281. * * *

(f) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expira-

tion of five years after the date the return was due.

Section 284 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 68, provides in part as follows:

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due. U. S. C. Sup. IV, Title 26, sec. 1065.

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CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 62.—OCTOBER TERM, 1931.

American Hide and Leather Co., Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[January 4, 1932.]

Mr. Justice STONE delivered the opinion of the Court.

This case is here on certiorari, 284 U. S. —, to review a judgment of the Court of Claims, denying recovery of an overpayment of income taxes because barred by the statute of limitations. 48 F. (2d) 430, 434. Claim for refund was filed September 15, 1925, and the questions presented are whether the court below correctly held that the admitted overpayment was of the tax due and payable for petitioner's fiscal year ending June 30, 1918, so that the bar of the statute had fallen at the time of the claim for refund, or was of taxes on income for the fiscal period ending June 30, 1920, and, if the latter, whether recovery was barred by the statute of limitations.

Petitioner filed income tax returns for the calendar years 1918, 1919, and 1920, although in each of those years it had kept its books on the basis of a fiscal year ending June 30th. By § 212 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1064, returns were required to be made on the basis of the fiscal year, as shown by the taxpayer's books of account, and under the applicable section and regulation petitioner was required to file a return for the six months ending June 30, 1918, and for the years ending on June 30, 1919 and 1920. § 226, 40 Stat. 1057, 1075; Treasury Regulations 45, art. 431. Pursuant to its returns for the calendar years in question, petitioner paid taxes as follows:

For the calendar year		
1918		$1,246,271.24
1919		1,113,509.41
1920		None
		$2,359,780.65
Refunds of the taxes paid were made in the following amounts, to which interest was added:		
May 17, 1928	$217,194.58	
Aug. 17, 1928	94,835.16	312,029.74
Net payments of taxes for the calendar years 1918, 1919, 1920		$2,047,750.91
The correct tax for the period in question as computed by the Commissioner on the basis of amended returns for petitioner's fiscal years:		
For the 6 months ending June 30, 1918	$708,068.47	
For the fiscal year ending June 30, 1919	896,314.83	
For the fiscal year ending June 30, 1920	None	1,604,383.30
Total overpayment for the period in question		$443,367.61

The Government contends that as the only return petitioner was authorized by the statute to make for the year 1918 was for the six months, January 1st to June 30th, petitioner's return for the calendar year can be given effect only as a return for that six months and payments of the tax as returned must be deemed, as the Court of Claims held, to be on account of the tax due for the six months, with a consequent overpayment for that period in the sum of $538,202.77. Of this overpayment, $94,835.16 has been refunded, and, as petitioner concedes, recovery of the $443,367.61 balance is barred by the statute of limitations if it be treated as an overpayment attributable to that period.

The petitioner insists that the amount paid as tax for each of the calendar years 1918 and 1919, should be divided and one-half applied to payment of the tax due for the fiscal period ending June

30th and one-half to payment of the tax due for the following fiscal year, the first six months of which were the last six months of the calendar year for which the tax was paid. This would result in an underpayment for the six months ending June 30, 1918, of $84,932.85, collection of which is barred by the statute; in an overpayment for the year ending June 30, 1919, of $66,380.91, reclaim of which is also barred by the statute; and in an overpayment for the year ending June 30, 1920, of $556,754.70, for which claim for refund was filed September 15, 1925, and for recovery of which the present suit was brought.

We think that neither the Government nor the petitioner has chosen the correct method of restating the account. At the outset it is to be observed that throughout the taxable periods in question the total payments made by the taxpayer always exceeded the total taxes due, computed, as the statute required, on the basis of the taxpayer's fiscal years, and the right to recover the excess payment turns on whether it was paid for a period bringing it within or without the applicable period of limitation. The periods for which the several payments by petitioner were made are not necessarily the same as petitioner's fiscal years, for which the statute required returns. The object of the payment is in each instance defined by the intention of the taxpayer, to be ascertained from all the relevant facts and circumstances. To determine petitioner's intention, we may look at the returns which it filed, even though they mistakenly embraced a period which did not coincide with the fiscal period for which a return was prescribed.

The return made for the calendar year 1918, and the payments of tax made in accordance with it, disclose unmistakably petitioner's intention to pay the tax on all income received during the the calendar year 1918. Of the total income thus received, only that of the first six months was, under the statute, taxable in that year. Hence, the payment of taxes on the income for the entire year resulted in an overpayment of the tax accrued in the first six months in the sum of $538,202.77. But this is not, as the Government contends, to be regarded as an overpayment only of tax due for the first six months of 1918. True, the taxpayer was required to make a return and pay taxes for that six months, and was not authorized to make any other return, but it did in fact make a return of its income and pay taxes for the entire calendar

year and thus evidenced its intention to include in the return and pay taxes upon income accruing in the last, as well as the first six months of the calendar year. Thus, when the taxpayer had completed its payments of taxes for the entire year, they were enough to pay in full the tax due and payable for the six months ending June 30, 1918, and in addition to pay the sum of $538,202.77 on account of the tax on income accrued in the remaining six months of the year for which the payment was made. But as those six months were embraced in the fiscal period ending June 30, 1919, which for purposes of assessing and paying the tax the statute treats as a unit, the overpayment must necessarily be treated as a payment on account of the tax accruing for that period.

For the calendar year 1919 the same considerations govern. The overpayment last referred to, applicable on account of taxes due for the fiscal year ending June 30, 1919, was not sufficient to pay the entire tax, aggregating $896,314.83, which the Commissioner assessed for that period. But the payments for the calendar year 1919 when added to this overpayment, exceeded the tax assessed for the fiscal year ending in June by a sum amounting, after deduction of refunds since made, to $443,367.61. As in the case of the tax paid for 1918, that paid by petitioner for 1919 was not for the fiscal, but for the calendar year. Consequently, the payment in excess of the tax due and payable for the period ending June 30, 1919, was in fact and in law a payment in advance on account of the tax upon income for the ensuing taxable period, the fiscal year ending June 30, 1920. As upon recomputation of the tax none was found due for that fiscal year, this payment in advance became an overpayment, when the tax for that period was assessable, which the petitioner is entitled to recover unless barred by the statute of limitations.

Section 284 (b) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides that no refund shall be made after four years from the time the tax is paid unless within that period a claim for refund is filed by the taxpayer. But by § 284 (h) it is provided that that section shall not "bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920, if such claim is filed before the expiration of five years after the date the return was due." As the petitioner's tax payments for the entire period

under consideration were completed in December, 1920, its claim for refund, filed September 15, 1925, was not within the four year period, and its right to recover is barred unless September 15, 1925, the date the claim was filed, was before the expiration of "five years after the date the return was due", as provided by paragraph (h). The claim was in time only if, as petitioner contends, the return was due September 15, 1920, which is the date fixed by § 227 of the 1918 Act for filing petitioner's return for the fiscal year ending June 30th. See *Burnet* v. *Willingham Loan & Trust Co.*, 282 U. S. 437.

On its face, § 284 (h), which specifically refers to a claim for a refund "of a tax for the taxable year . . . 1920", and bars it if not filed within five years after the return was due, would seem to refer to the time fixed by the statute for return of income for the taxable year for which the tax was paid, which, in this case, was September 15, 1920. But the Government, notwithstanding its argument that the return for petitioner's fiscal year is the only one referred to or authorized by § 212 of the 1918 Act, insists that the words "date the return was due" in § 284 (h) of the 1926 Act refer to the return which the taxpayer in fact filed for the calendar year 1919, which, under the applicable section, § 227 of the 1918 Act, was due on March 15, 1920. In support of this contention it points to the language of § 252 of the 1918 Act, in which the quoted words first occurred. In that section they were preceded by a provision requiring credit or refund "if, upon examination of any return," an overpayment appeared. From this it is argued that the proviso in the same section that refund should not be allowed unless claim was made within five years from the "date the return was due" refers to the due date of the return actually filed and not the due date of the return required by the statute.

But it is to be noted that the reference, in § 252 of the 1918 Act, to an examination of the return, which was continued in § 252 of the 1921 Act, c. 136, 42 Stat. 227, 268, was dropped from the corresponding § 281 of the Act of 1924 and the applicable § 284 of the Act of 1926. Both of these sections provide for refund or credit of any overpayment of the tax, and specific reference to the taxable year 1920 was inserted in the proviso that the section should not bar claims for overpayment of "a tax for the taxable year 1919 or 1920" if "filed before expiration of five years after

the date the return was due." Whatever the meaning of "return" as used in the earlier sections, we think it reasonably clear that the omission by the later ones of all reference to the return actually filed and the insertion of a reference to the taxable year, in juxtaposition to the phrase "five years after the date the return was due", evidenced an intention that the date from which the statute is to run should be the due date of the return required by the statute for the taxable year.

There is no basis for the contention of petitioner that the taxes paid for each calendar year should be divided and one-half applied to tax due for the first six months and one-half for tax accruing in the last six months of the year.[1] We think neither the circumstances nor the applicable statute permits such an allocation. Section 226 of the 1918 Act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the ~~calendar~~ fiscal year, *pro rata* to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84. But the section does not authorize a like apportionment of the tax paid for the calendar year, and none was made by the returns which petitioner filed. The tax paid was for the income of the entire year and was obviously intended to be applied to the payment of any tax due or payable in that year, which would include all the tax accruing for the fiscal period ending June 30th. Under § 252 of the Revenue Act of 1918, petitioner could not at any time have claimed a refund of any overpayment of tax except such amount as was "in excess of that properly due" for the first six months, and since the excess, as already indicated, was, in each year, paid on account of the calendar year a part of which fell within the fiscal period following June 30th, a correct statement of the account requires the overpayment to be credited to that rather than the preceding fiscal period.

[1] Such a prorating of tax payments in order to allocate taxes, erroneously paid for a calendar year, to the portions of the two fiscal years which make up the calendar year was allowed by the Board of Tax Appeals in Paso Robles Mercantile Co. *v.* Commissioner, 12 B. T. A. 750; aff'd. 33 F. (2d) 653. Certiorari was denied, 280 U. S. 595, upon a petition which did not present for review the method of allocation thus adopted.

It follows that recovery should be allowed of the amount of the overpayment not already refunded, which, as stated, is $443,367.61, with interest computed in accordance with the applicable statutes, and that the judgment should be reversed and the cause remanded for further proceedings in accordance with this opinion.

The amounts of the tax computed by the Commissioner and the amount of the overpayment as stated in this opinion are those shown by the findings of the Court of Claims, but the mandate of this Court will be without prejudice to any restatement of the amount of overpayment based on a recomputation of the tax.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.